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Cooperation in Unemployment Relief Urged

IN response to a request from the President's Organization on Unemployment Relief, the Vice Presidents and members of the Local Councils of the American Bar Association have been urged to cooperate with the state and local bar associations in any activities they may undertake in connection with the alleviation of unemployment and the resulting distress. This presents an opportunity for service not only on the part of the officers of this Association but the membership in general. The following letter upon the subject was recently sent to the above officials by Secretary William P. MacCracken, in accordance with a request of the President of the Association:

"Chicago, November 9, 1931.

"Dear Sir:

"The President's Organization for Unemployment Relief has requested the American Bar Association to take upon itself the responsibility of communicating with its local units throughout the country, urging them to support and participate in unified local unemployment relief activities.

"Inasmuch as the American Bar Association does not have local units, we have replied to this request suggesting that the work be organized through the state and local bar associations, and also offering the cooperation of the vice presidents of the American Bar Association, and the members of the Local Council for each state in any activities which may be undertaken by the State or local Bar Association.

"The President of the Association has requested me to bring this matter to your attention, and to urge you to render every assistance possible in solving the unemployment problem."

The sub-committee on Employment Plans and Suggestions of President Hoover's Committee has prepared a report, copies of which may be obtained on request addressed to the Executive Secretary. It deals with such subjects as Resumption of Work, under which head it urges united national action to encourage every American citizen now employed to resume normal buying; Need of Further Credit Help, under which head it stresses the need of reestablishing public confidence in our financial and credit structures, points to the dangers of hoarding and the relief promised by the National Credit Corporation and other agencies; "Bankers Must Broaden View," suggesting in that connection that bankers adopt as liberal and encouraging an attitude as possible toward the credit requirements of their average customers.

Other subjects treated are "Spread of Work," so as to give employment to as many people as possible; "Civil Service," under which head it suggests that public employes of this class make a definite contribution to relief; "Public Works," the Committee urging that "nothing be omitted to make immediately available new additional employment represented by public work already authorized and appropriated for but delayed or blocked by removable legal obstacles and supervisory red tape; "White-Collar Relief," or help for a class which is unorganized and least vocal of all, and which is likely to suffer distress often more acute than that of the industrial worker; "New Concept of Work," under which available work will be distributed according to the best interests of the nation; "Community Surveys," to determine available work; and a "Farm Labor Plan," according to which a portion of unemployed city labor may be transferred to farms for the winter, working for board and lodging and perhaps a small wage.

Another Monumental House of the Law

A RARELY beautiful and monumental group of buildings devoted to legal study and research was dedicated at Yale University on Oct. 3. The group was gift of the late John W. Sterling of the class of 1864. The presentation address was made by George H. Church on behalf of the trustees of the estate, and the buildings were accepted by President James Rowland Angell of the University. Other addresses were made by Dean Charles E. Clark of the Law School, by Judge Thomas W. Swan, and by Hon. William D. Mitchell, Attorney General of the United States. In accepting this munificent gift President Angell said:

"I have the honor, on behalf of Yale University, to accept, with deep gratitude, these superb buildings erected under the will of her devoted son and generous benefactor, John W. Sterling of the Class of 1864. The wisdom and skill displayed by the architect in providing the facilities requested by the faculty of the School of Law, not less than the extraordinary beauty of line and form and color and space which he has graciously blended in the structure, make it notable in the great galaxy of noble buildings with which Yale has recently been endowed.

"As a distinguished lawyer and a wise counsellor, perhaps the first in America to adopt as a definite career that of legal advisor to great business interests, it is highly appropriate that Mr. Sterling's name should go down in history in connection with the School of Law of his Alma Mater —a School which is blazing new paths in legal education.

"At a time when law as law is under a shadow of popular suspicion and disrepute, at a time when neither the bar nor the bench enjoys that high respect which should be theirs under our constitutional form of government, at a time when the traditional foundations of the social and economic order are severely shaken, there is profound need, at the hands of our universities and their schools of law, for the most searching and enlightened study of all the fundamental problems of our political, economic and moral order—problems which touch our legal procedure at every point from legislation clear through to judicial decision and execution. In such study, Yale and her School of Law are recognized leaders, and in these new quarters, where students and teachers, working side by side, may have constant and easy access to one another, thus promoting invaluable forms of intellectual companionship, we confidently hope for steady and significant contributions to a revealing knowledge of the past and the present and also to the training of men imbued with high ideals of their mission and with a thorough discipline which will permit them to take effective places in the life of the community, helping to render the law a wise and useful servant of the commonwealth. To such high purposes we dedicate these buildings, fit memorials of the eminent man whose name they bear."

The following extracts from the report of Dean Charles E. Clark to the President and Fellows of Yale University give a description of the quadrangle which should prove of general interest:

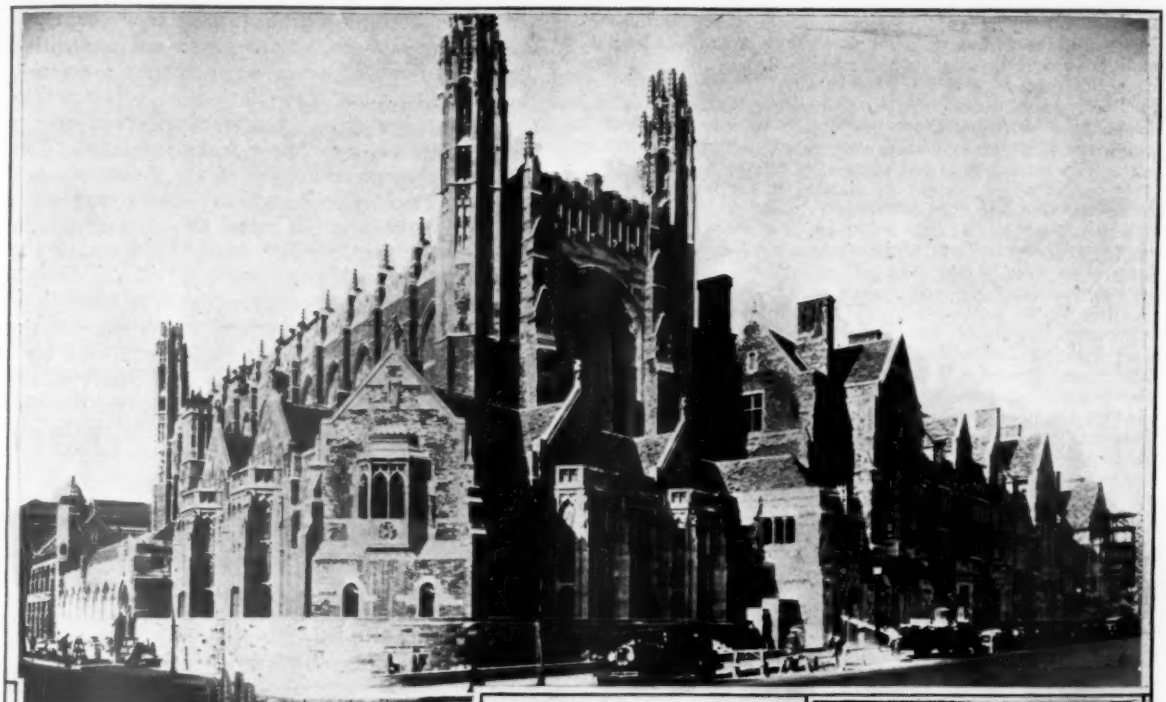
"The plan of a single building or group of buildings where law students might both live and work, modeled on the idea of the English Inns of Court, was long advocated by General Charles H. Sherrill, B.A. 1889, LL.B. 1891, M.A. 1892, former president of the Yale Law School Association. Dean Thomas W. Swan throughout his term of office urged it on all appropriate occasions and took the leadership in framing the detailed plans in a form eventually followed in substance. At last in 1927 came fulfillment of the plan when the Trustees of the Estate of John W. Sterling, B.A. 1864, made a gift of $5,000,000 for this purpose. Work commenced in August, 1929, and the entire structure was fully completed in less than two years. Of the gift, four-fifths was used for costs of erecting and furnishing the buildings, while the remainder forms a maintenance fund, of which the income will be used for the physical upkeep of the property. The architects were James Gamble Rogers, Incorporated, of New York, and the builders, The Sperry and Treat Company of New Haven. . . .

"The law quadrangle is the most northerly of a series of notable buildings in the Collegiate Gothic type of architecture, beginning with the square just south of the old Library Street, now closed. In order they are Dickinson and Wheelock Halls, the Memorial Quadrangle, the Sterling Quadrangle (partially completed), the Sterling Memorial Library, and the Sterling Law Buildings. The other structures are almost entirely of stone, but in the law quadrangle the stone on the sides near the University Library gives way to brick, with limestone trimmings, particularly in the dormitory sections—a striking and colorful combination.

"In the center of the law quadrangle is a low, two-story structure containing six furnished suites (study, bedroom, and bath) for distinguished visitors. This building is so arranged as to create three courts within the quadrangle, a large one between it and the school building, and two smaller ones on its immediate west. The view from the school into these courts, with the various roof levels appearing over the visitors' building, is unsurpassed if not unequalled in any of the new Yale buildings.

"As now arranged, the dormitories will accommodate 219 students. There are sixty-three suites, each for two students, consisting of study and two bedrooms, three suites of study and bedroom, and ninety single rooms. In addition, there are four tutor's suites, consisting of living room, study, kitchenette, bedroom, and bath, for members of the faculty. On the Grove Street side on the first floor are the kitchen, the dining room, and the students' large lounge with entrance to the latter from the school. The dining room and the lounge may be combined when desired for use for banquets and meetings, since the large opening between them is closed only by a draw curtain. Over this section are three stories each containing eighteen single rooms available for dormitory purposes, or, as occasion may arise, as additional offices for the school, since they may be entered from the school building proper. Already eight of these rooms—four each on the second and third floors—are so used.

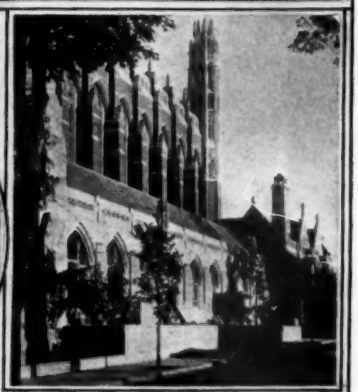
"The main entrance to the school at 127 Wall Street is through a vaulted porch. The entrance leads through a vestibule to a wood-paneled corridor running the length of the building and opening into a like vestibule and porch on Grove Street. Opening from this corridor are many of the seminar



THE STERLING LAW BUILDINGS Viewed from the Corner of GROVE and HIGH Sts.

THE DEAN'S OFFICE and LIBRARY TOWERS overlooking the corner of WALL and HIGH St's.

MAIN ENTRANCE to the STERLING LAW BUILDINGS at 127 WALL STREET



SEMINAR ROOMS of the STERLING LAW BUILDINGS looking out on HIGH STREET

ENTRANCE to one of the DORMITORY SECTIONS of the STERLING LAW BUILDINGS on GROVE St.

VIEWS OF THE STERLING LAW BUILDINGS, RECENTLY DEDICATED AT YALE UNIVERSITY

Pictures by courtesy of *Yale Alumni Weekly*

rooms, the smoking room, the main stairs, the three large classrooms, the auditorium, and the women students' lounge, while cross corridors lead to the students' lounge, the remaining seminar rooms, and the administrative offices.

"The seminar rooms, fourteen in number, including one arranged as a court room, are designed to accommodate small groups ranging from four or five to perhaps twenty each, with one or two for larger groups of possibly fifty each, for special study or instruction. Eight are situated on the west side and six on the east side of the building. In the center, and thus protected from all outside noise, are the three classrooms seating 144, 84, and 104, respectively, at tables comfortably designed for note-taking. The ceilings in the large classrooms have been finished with Acousti-Celotex to insure the proper acoustics in the lecture halls. The north corner of the site forms an acute angle, and advantage was taken of this to place here an auditorium having the ideal fan-shaped plan, with main floor and balcony together seating 584 people. The room is designed for motion picture equipment. The windows are stone mullioned, decorated with tracery and arched transoms, and contain designs in ornamental stained glass. Checkrooms for the auditorium and the students' lounge are conveniently located near by.

"On the south side are the administrative offices, consisting of a large general office with information desk and files arranged to form a counter, the office of the Registrar with a vault for records, a general office and the private office of the Dean, and an office for the assistant to the Dean. The Dean's office is of paneled oak with hardwood floor. One of the panels opens into an inner office.

"In a mezzanine floor are located the telephone operators' room and rest rooms with kitchenette for the clerical force. On the second floor, in addition to a library stack space, the auditorium, balcony, and a large room for stenographers, are twenty-four offices for professors. There is also the faculty lounge, with fireplace, bookshelves, comfortable furniture, and kitchenette. On the third floor, in addition to the main reading room, library offices, stack rooms, and work rooms, are six professors' offices, a suite of six offices for the *Yale Law Journal*, and an international law room. The fourth floor has library stack space, four offices, a squash court, and an exercise room with lockers and showers for the faculty. On the fifth floor are two offices and library stacks. In the basement are library stacks, large locker and lavatory rooms, storage space for the *Yale Law Journal*, an extra record vault, receiving room for the library, general storage room, space for mimeographing machinery, and machine and electrical switchboard rooms for the operation of the building. The care of the buildings calls for the services of about twenty people. Numerous stairways and two elevators lead to the upper stories. The main stairway to the reading room is in the center of the west side.

"Extensive use has been made of symbolism in the sculptured stone and stained glass embellishments throughout the school building and the dormitories. Among these, the following may be noted: judges and lawyers in costume; noted persons connected with events of legal import; officers of the law; objects and instruments, both historical and modern, associated with the capture, trial, and punishment of criminals; buildings, such as the Inns of Court, associated with the law; symbols of law and justice; and symbols of legal codes of all ages. . . ."

World Court Protocols and Bar Associations

HON. JOHN W. DAVIS, member of the committee on Foreign Relations of the American Foundation, has issued a statement making public the results of a survey by the Foundation to determine the degree to which state, city, county and local bar associations in all parts of the country have considered the question of Senate ratification of the three World Court protocols. The statement follows in part:

"Since the Senate Foreign Relations Committee has agreed to take up the question of reporting these protocols to the Senate at its meeting on December 16 next, the recommendations which groups of lawyers all over the country have recently made become significant. Very recently a New York newspaper, whose consistent opposition to the Court is well known, implied that the action of the American Bar Association of a few weeks ago, vigorously urging Senate ratification of the pending protocols, was hasty and stimulated. The fact is that the recent action of the American Bar Association constitutes the fifth formal expression made by the Association upon the subject of the Court in as many different years. Under such circumstances it could hardly be, as the aforesaid newspaper implied, the expression of a small bloc within the organization, determined to commit the group as a whole to a Court policy not held by a majority of the membership. My own study of the situation leads me to believe that the recent action of the American Bar Association is substantially a reflection of a country-wide legal sentiment that has been separately expressed by many local legal bodies. Even a brief reference to these will indicate the depth and the comprehensiveness of the consideration which bar associations have given to this question through many years, as evidenced by the result of the significant present survey covering many state and local legal groups.

"Many of the legal groups which have recently acted have merely brought up to date action taken by them in previous years. The New York City Bar Association has discussed the question at several meetings. The San Francisco Bar Association has taken two referenda on the question. A number of the associations that have acted have done much more than simply pass a resolution. The Cleveland Bar Association, after thorough-going discussion of the question itself, organized a speakers' bureau to furnish speakers without charge to local organizations interested in informing their members upon the merits of the Court question and the present status of the negotiations leading to the adherence of the United States.

"I personally know of no state, city, county or local bar association anywhere in the United States whose formal action has resulted in the expression of opposition to the adherence of the United States to the World Court. In addition to the New York City, the Cleveland and the San Francisco Bar Associations, city bar associations in New Orleans, Denver, Chattanooga and Little Rock have expressed their belief that the Senate should complete our entrance into the Court this winter.

"Since the spring of this year alone, the Virginia, Texas, Louisiana, Arkansas, Oregon, Vermont and Missouri Bar Associations have called upon the Senate to ratify the protocols. The Vermont Bar Association, with only two sessions, devoted the whole of one of them to a discussion of the World Court situation, opening the meeting to the public because of its realization that this question ought to be widely discussed and more generally understood. The Arkansas Bar Association has not failed, at its last four annual meetings, to urge Senate action. The Connecticut, Minnesota, New York, Tennessee, Ohio, Mississippi, Nebraska and New Jersey Bar Associations are others that have called upon the Senate to ratify the protocols."

First Meeting of the Conference of Bar Examiners

ONE of the most interesting of the meetings held at Atlantic City before the beginning of the regular sessions of the Association was the Conference of Bar Examiners. This met for the first time on September 16th, upon the call of an organization committee appointed last year by the Chairman of the Section of Legal Education and Admissions to the Bar. About sixty people were present, among whom were official representatives from half of the law examining boards of the United States.

Mr. Philip J. Wickser, Secretary of the New York Board, presided as Chairman of the organization committee, and opened the meeting with an address surveying in brief the field of work of the Conference as well as the task of the individual bar examiner. This was followed by a paper by Dean Herbert F. Goodrich of the Law School of the University of Pennsylvania, President of the Association of American Law Schools, entitled, "Bar Examinations and Legal Education." A third paper was read by Mr. Stanley T. Wallbank of the Colorado Board of Law Examiners, on the subject of "The Function of Bar Examiners."

Following the formal addresses a committee on permanent organization reported to the Conference a plan to be used as the framework for the organization, subject to such later amendment and revision as should prove necessary. The plan as presented provided that all members of boards of law examiners or character committees should be entitled to be members of the Conference, and should become members when in attendance at its meetings. It was provided that the Conference meet annually at the time of the meeting of the American Bar Association, and at such other times as the Executive Committee should determine. The officers of the Conference were specified as a Chairman, a Secretary-Treasurer, and an executive committee of five members, four of whom should be appointed by the Chairman, the fifth to be the Chairman's predecessor in office. The executive committee and the officers were given terms of one year. Each state was urged to contribute toward the expense of permanent organization of the Conference, including the paying of part of the expenses of one or more of its representatives to each meeting. This plan of organization was adopted and thus establishes the Conference of Bar Examiners as a permanent organization, which, though independent of the American Bar Association, will meet at the time of the annual Bar meeting, and will undoubtedly work closely with the Section of Legal Education and Admissions to the Bar.

The following resolution was adopted:

"BE IT RESOLVED that Whereas the Carnegie Foundation for the Advancement of Teaching has been of inestimable service to the legal profession in its reports in reference to law schools, requirements for admission to the bar in the several States and matters of interest to the profession generally,

"Whereas it has facilities for the gathering of accurate statistical data, therefore,

"It Is Hereby Resolved that the Secretary of this Conference transmit to the Foundation a request that it compile and publish yearly figures regarding the number of applicants for admission to the bar, the number passing and failing each year in the various States, the number admitted on diploma, and such other figures dealing with this subject as may be enlightening to the profession."

A further resolution declaring it the sense of the meeting that professional ethics should be included as a subject of examination in each bar examination, either by separate examination or by means of separate questions, was introduced and referred to the Executive Committee.

Mr. James C. Collins, Chairman of the Rhode Island Board, was elected as Chairman of the Conference, and Mr. Will Shafroth, Adviser to the Council on Legal Education and Admissions to the Bar, was elected Secretary-Treasurer. The Executive Committee as at present constituted consists of Mr. A. G. C. Bierer, Jr., of Oklahoma, Mr. Stuart B. Campbell of Virginia, Mr. Stanley T. Wallbank of Colorado, and Mr. Philip J. Wickser of New York.

In the afternoon the examiners attended the meeting of the Section of Legal Education and Admissions to the Bar, and reconvened in the evening for a series of very interesting round table discussions. A round table on "Character Examination of Candidates for Admission to the Bar, Standards of Ethics, and the Junior Bar Plan" was led by Dean Paul Shipman Andrews of the University of Syracuse Law School, assisted by Mr. Morris Duane of Pennsylvania, Mr. George A. Spiegelberg and Mr. Lloyd Scott of New York. Mr. Charles P. Megan of Illinois conducted a round table on the subject of "Re-Examinations, the Problem of Repeaters, the Overcrowding of the Bar, and Aptitude Tests," and was assisted by Mr. A. G. C. Bierer, Jr., of Oklahoma, Mr. Albert Crawford of Yale University, and Mr. Rollin B. Sanford of New York. A third table under the guidance of Mr. James C. Collins of Rhode Island discussed "The Essay Type of Question and Oral Examinations." Mr. Stuart B. Campbell of Virginia and Mr. John Kirkland Clark of New York were assistants at this round table.

A very considerable enthusiasm was displayed by the examiners present, as was evidenced by the fact that some of the round tables did not break up until midnight. The executive committee is planning the establishment of an office which will act as a central clearing house for bar examiners and aid in the solution of their problems. This project includes the publication of a bulletin which will be sent periodically to bar examiners, and the gathering and analysis of data which will be of aid to them.

Practitioners Before Interstate Commerce Commission Hold Meeting

AT its second annual meeting held in Washington, D. C., September 24-25, the Association of Practitioners before the Interstate Commerce Commission devoted its attention largely to the consideration of methods to expedite proceedings before the Commission and to relieve it of some of its burdens.

Hon. Ezra Brainerd, Jr., Chairman of the Interstate Commerce Commission, in his address of

welcome stated that while there were many matters of mutual interest that might profitably be discussed, he would mention one—the relief of the Commission. This was important both from the Commission's standpoint and from the standpoint of the Association and the public generally. No member under existing conditions can long continue to do the work that his official duties require of him. It is well-nigh physically impossible. Such a situation is not at all conducive to the proper administration of justice. It is unsatisfactory to the Commission and must be equally so to the practitioners who appear before its bar.

In its annual report for 1929, he said, the Commission stated that "The continual growth in variety and volume of the work devolved upon the Commission has made the performance of our duties less and less current," and it recommended to Congress that "for the more prompt disposition of matters intrusted to us there should be express statutory authority for the Commission to delegate to individual Commissioners and employees of the Commission the power to perform specified duties and to consider and determine specified matters and subjects, subject to the general control and supervision of the Commission and the exercise by it of appropriate powers of review either through the Commission or a division thereof."

These suggestions with some modifications had been embodied in the Parker Bill introduced in the last Congress. Hearings were held but no action was taken. In urging action on the bill the Commission suggested that it provide that its power to delegate its authority to individual Commissioners and employees should not extend to investigations instituted upon its own motion, nor, without the consent of the parties thereto, to contested proceedings involving the taking of testimony at public hearings.

Chairman Brainerd referred to the objection on principle made to the bill by many because of the delegation of the Commission's power and as proposing a wholly inadequate remedy, and to the suggestion that the Commission might be divided into three separate tribunals, one to have jurisdiction over valuation, one over finance and one over rates. He urged further suggestions which might bring relief, and aid in a proper solution of the Commission's difficulties.

President Esch in his address reviewed the various acts of Congress which sought to facilitate and lighten the Commission's administration, such as increasing the number of members from time to time, and as its duties were enlarged; increasing its appropriations, making possible an adequate personnel; authorizing the Commission to divide its membership into as many divisions as it deemed necessary; relieving the Commission from the labor and expense of preparing and publishing the so-called "sailing lists" as required by Section 25 of the Transportation Act, 1920.

During the last decade and even prior thereto, he continued, the Commission had repeatedly sought legislation from Congress to lessen and thereby permit it to expedite its work and to remedy existing defects in the law as follows: It asked that the power to award reparations be placed wholly in the courts. It recommended, in every annual report since 1920, that Section 1 of the Act be amended to provide for the punishment of any person offering or giving to an employee of a carrier any money or thing of value with intent to influence his action or decision with respect to car service, and to provide also for the punishment of the guilty employee; that owing to the size and complexity of the problem, it be relieved from the preparation and adoption of a complete plan for the consolidation of railroads; that paragraph 5 of Section 15a of the Transportation Act, 1920, relating to the income in excess of a fair return, held in trust for the United States, and paragraph 6 of the same section relating to the disposition of the excess of income over 6 per cent., be clarified. It made a like request as to paragraph (f) of Section 19a of the Valuations Act, relating to keeping valuations up to date and it also asked a definition of electric railways. None of the above recommendations for legislation have been acted upon by Congress.

President Esch declared that "it would seem reasonable that the least Congress should do as to such recommendations would be to have bills introduced and full and prompt consideration given to them with opportunity for all interested to be heard." He also referred to the Parker Bill, which was the form of relief stressed by Chairman Brainerd, urging that its enactment would enable the Commissioners to devote more time and attention to matters of major importance, would expedite the handling of the Commission's work generally and would permit greater opportunity for oral arguments of the cases of lesser importance before the body rendering decision in the first instance.

Notwithstanding the delay in acting upon its recommendations for legislative relief, he continued, the Commission under existing laws has adopted many administrative policies which have materially expedited and lessened its work, as follows: Under Section 13 of the Act enjoining active cooperation between the Federal and State regulatory bodies, as a result of conferences, a set of rules was agreed upon for joint hearings and conferences where intrastate rates were involved, thus obviating conflicts and causes for friction.

To hasten its tentative valuations it had tested out a shortened procedure, "which consisted of conferences between the Commission's technical representatives and the technical representatives of the parties to the case with a view to clarification and simplification of the issues, elimination of immaterial matters and of controversy having its source in lack of understanding, and the reaching of agreements or the preparation of statements of facts on technical issues." This procedure has greatly hastened the bringing of primary valuations to a close. It had also adopted a shortened procedural method of handling the simpler formal cases.

The savings in time and expense the above policies and expedients have brought about, he said, have been largely neutralized by new legislation imposing added duties. New legislation of far reaching import relating to the regulation of buses and trucks, holding and forwarding companies is in prospect.

Vice-President Samuel J. Wettrich of Seattle, Washington, made an address on "Transportation Dialectics." He complimented the Commission by saying without qualification "that no other governmental or administrative body has ever accom-

plished better results in a particular field of endeavor." He suggested that the Association have a co-operative Committee composed of its ablest men to hold occasional conferences with the Commission, in order that the views of the members and those dealing with them may be combined to work out the most complete and satisfactory operating methods that may possibly be had. If this cannot be done under existing law the conclusions reached should be submitted to Congress. His main discussion related to government ownership to which he was strongly opposed, stating that he believed that such ownership and operation would be the worst calamity that could befall us.

Judge R. W. Barrett, Vice-President and General Counsel of the Lehigh Valley Railroad, presided as toastmaster at the annual dinner given on the evening of September 24. Among the speakers were W. H. Chandler, of the Merchants Association of New York, who responded in a facetious manner to the toast "What I should do if I were the Interstate Commerce Commission." Mr. Arthur Mackley, an examiner of the Commission, entertained the audience on the theme "Advice by the Examiners to the Practitioners." Commissioner Eastman was the last speaker and was assigned the subject "A Few Thoughts on Transportation."

A leading feature of the forenoon session of September 25 was the illuminating address given by Commissioner Aitchison based upon his recent trip to the continent on "Railway Regulation in Great Britain."

The Committee on Professional Ethics and Grievances made a report through its Chairman J. H. Beek, of Chicago, Illinois. The report stated that the Code of Ethics adopted by the Association was predicated upon the Code of Ethics adopted by the American Bar Association with such modifications as were necessary to meet the needs of the Association and the practice of the Interstate Commerce Commission. The Committee had received several complaints of unethical conduct on the part of some of the members. The Committee has taken the position that, except in cases involving moral turpitude, its functions should be to educate practitioners by advising them of the provisions of the Code and admonishing them as to their future conduct.

During the past year most of the complaints of unethical conduct were not of a serious nature and only one could be said to involve moral turpitude. The report called attention to the fact that the Committee was handicapped because its membership was so widely scattered; that it would be unfair to criticize or condemn a member against whom a complaint had been filed without affording him an opportunity to be heard in his own behalf. To relieve this situation Chairman Beek recommended that the composition of the Committee in future should be of members located in Washington or at near-by points and that two or three meetings be held each year. No final action was taken on this recommendation by the Association. The Chairman stated that the adoption of the Code has already had a very marked effect upon the professional conduct of the members.

The Association voted that the Committee on Education for Practice, with the advice and sanction of the Executive Committee, give further study to the question of making a survey, or assisting the Interstate Commerce Commission to make a survey, of the courses which are now being offered which purport to prepare people to practice before the Commission, and that those two committees have power to make reply to the Commission as to what program, if any, this Association is willing to carry out.

The report of the Committee on Procedure, of which Frederick L. Ballard, of Philadelphia, Pennsylvania, is Chairman, was laid before the meeting. The report considered the suggestion made by Mr. T. M. Henderson on behalf of the Southern Traffic League looking to a reform in the method for allotting time at oral argument. Under the present system, the Commission's "Notice to Litigants and Counsel," which accompanies announcement of the date for oral argument, requires all those who desire to take part to notify the Commission ten days before the date fixed of the allotment of time desired. This is customarily done but the time actually allotted cannot be known until the morning of the argument. The prevailing opinion of the Committee was that efforts should be made to improve on the present "last minute" system. It was not prepared to specify in detail just what new system should be tried, but preferred that the Committees be authorized to take the matter up with the Commission with a view of working out jointly a procedure whereby counsel may know reasonably in advance of the argument the amount of time allotted to him.

On motion of C. E. Cotterill, of Atlanta, Georgia, it was voted as the sense of the Association that in the forthcoming year the Committee on Practice and Procedure shall comprehensively survey the entire body of practice and procedure before the Commission and the workings of the Commission itself, with a view to the proper submission of its conclusions and recommendations at the next annual meeting.

The following officers for the ensuing year were elected:

President, Henry Wolf Bikle, Philadelphia, Pennsylvania; Chairman, Executive Committee, Paul M. Ripley, New York, New York; Vice-Presidents—Ernest S. Ballard, Chicago, Illinois; Allen P. Matthew, San Francisco, California; James T. Ryan, High Point, North Carolina. Secretary, W. H. Chandler, New York City; Treasurer, Clarence A. Miller, Washington, D. C.

The 1932 Meeting

The Executive Committee, at its recent meeting in Atlantic City, decided to hold the next Annual Meeting of the Association at Washington City on the last Wednesday, Thursday and Friday in September (Sept. 28, 29 and 30).

Binder for Journal

The Journal is prepared to furnish a neat and serviceable binder for current numbers to members for $1.50. The price is merely manufacturer's cost plus expense of packing, mailing, insurance, etc. The binder has back of art buckram, with the name "American Bar Association Journal" stamped on it in gilt letters. Please send check with order to Journal office, 1140 N. Dearborn St., Chicago, Ill.

ROGER BROOKE TANEY

While His Judicial Work Came to Be Distinguished for His Support, with the Force of Profound Conviction, of the Power of the States "Over Their Own Internal Police and Improvement," Still He Recognized in Many Notable Opinions the Importance of Maintaining National Authority and Its Supremacy within Its Constitutional Domain—No Sufficient Grounds for Attack on His Qualifications—No Doubt of Integrity of Members of Court and Sincerity of Chief Justice in Dred Scott Decision—Ableman vs. Booth Opinion Crown of His Judicial Career—A Great Chief Justice*

By Hon. Charles Evans Hughes
Chief Justice of the Supreme Court of the United States

YOU have graciously permitted me to share in this tribute to the eminent jurist who in this community laid the foundation of one of the most distinguished careers in American annals. I respond to your invitation not only with gratification but with a keen sense of obligation. The Justices of the Federal Supreme Court are not merely titular successors in important official duties, but inheritors and developers in a continuous process of exposition, and thus enter with a lively consciousness of fellowship into the problems, the anxieties, and the achievements of those who have preceded them in their necessary but difficult task as weavers of the fabric of constitutional law.

The life of Roger Brooke Taney covered the period in which our institutions were created and solidified. He was born within the year following the Declaration of Independence, as the fortunes of the Revolution hung in the balance, and he died in the closing days of the Civil War. He was admitted to the Bar in 1799, and his professional activity was practically coterminous with the judicial service of John Marshall whom he succeeded as Chief Justice in 1836. For over twenty-eight years—a time of bitterest controversy ripening in tragical conflict—he presided over the Supreme Court, maintaining in the face of rancorous criticism, and amid the excesses of passion, a serenity and dignity, as well as a conscientious devotion to his task, which won the highest praise from the ablest and most discriminating of his associates, whose appreciation of character and talent was not impaired by either political or judicial disagreement.

Entering upon professional practice in Frederick in the year 1801, Taney could not but be inspired by the traditions of the illustrious Maryland Bar. It was a period favorable to the development of lawyers. Legal education, it is true, was but rudimentary. But there was opportunity to know all that was necessary to meet the demands of the day. Painstaking study was required, and Taney tells us that "for weeks together" he "read law twelve hours in the twenty-four." In speaking of his early efforts in special pleading, he says: "Chitty had not made his appearance, and you were obliged to look for the rule in Comyn's Digest, or Bacon's Abridgment, or Viner's Abridgment, and the cases to which they referred; and I have sometimes gone back to Lilly's Entries and Doctrina Placitandi—in searching for a precedent." Still, it was not difficult for a diligent, capable student to become familiar with all the law that had been declared here and in England, and also to have an appropriate acquaintance with Roman law. And Taney had what William Wirt called a "moonlight mind." The comparative paucity of material in published reports of judicial decisions made mastery the easier, and in questions of substantive law principles were more important than precedents. Developing communities and evolving institutions presented problems and interests worthy of the keenest minds, and it was a golden age for those who were apt in disputation. Questions were large and populations small, and superior ability shone forth with an opportunity which was more sparingly granted in subsequent days of a more crowded rivalry and a higher average of attainment. Eloquence was the crown of forensic effort and the methods of the courts favored those who had a talent for oratory. Oral arguments were expansive. Even at a much later time, a competent observer of the arguments of eminent lawyers in the highest tribunal was able to say that "one of the learned counsel occupied an entire day for the purpose of demonstrating this very difficult proposition in America, that the people are sovereign; and then pursued his argument on the second day by endeavoring to make out the extremely difficult conclusion from the first proposition, that being sovereign they had a right to frame their own constitution." From the beginning, argumentation was broad as well as deep, and successful lawyers were noted quite as much for the display of polemical powers and ambitious rhetoric as for acute analysis and precise reasoning. It was in this leisurely and congenial atmosphere of the courts that the abilities of both statesmen and jurists were ripened.

The Bar of Maryland enjoyed a distinction second to none. Frederick is honored by the memorial, not only of Taney, but of Thomas Johnson—who had the distinction of nominating Washington to be Commander-in-Chief—the first Governor of Maryland and appointed by Washington to be Associate Justice of the Supreme Court of the United States. In the galaxy of great Maryland lawyers of the earlier day we find such eminent names as those of William Paca, Daniel Dulany of Daniel, Jeremiah Townley Chase, Luther Martin (in his prime, the acknowledged leader of the Bar), and two who were appointed Associate

*Address delivered on the unveiling of the Bust of Chief Justice Taney, at Frederick, Md., on Saturday, Sept. 26, 1931.

Justices of the Federal Supreme Court, Robert Hanson Harrison and Gabriel Duvall. In the period of Taney's professional activity, there were in addition to Luther Martin, and aside from Taney himself, such outstanding Maryland lawyers—to mention but a few—as William Pinkney (of whom Marshall is reported to have said "He was the greatest man I have ever seen in a court of justice," and whom Webster described as the greatest of advocates); Robert Goodloe Harper, William Wirt, William H. Winder, Francis Scott Key (Taney's brother-in-law and fellow student, who wrote the Star Spangled Banner), and younger, but rising rapidly, Reverdy Johnson. It was under the influence and example of such illustrious inspirers and associates that Taney practiced law. After twenty-two years in this community, he removed to Baltimore, following, in recognized leadership, in the footsteps of Martin and Pinkney until Wirt came a few years later to divide the honors. Political distinction now awaited Taney. After serving as Attorney General of Maryland, he was appointed by President Jackson, in 1831, Attorney General of the United States, and Secretary of the Treasury in 1833. I shall not attempt to review his brief political career, the circumstances of the acrid controversy over the removal of government deposits from the United States Bank, or the animosities which were aroused, so violent and implacable that they led to the rejection by the Senate of Taney's nomination as Secretary of the Treasury and later of his nomination (although it met with Marshall's favor) as Associate Justice of the Supreme Court of the United States. Thus rejected in 1835, within little more than a year, as a result of changes in the Senate but after a long struggle, he was confirmed by the Senate as Chief Justice and his judicial career with its momentous consequences began.

There were no sufficient grounds for the attack upon Taney's qualifications. Henry Clay, who with Webster determinedly opposed Taney's confirmation, later magnanimously admitted his error, and with a depth of feeling that did him credit, told the Chief Justice himself: "Mr. Chief Justice, you know that, in my place in the Senate, before your nomination to the office you now fill was submitted to that body, as well as during its consideration, I said many harsh things of you. . . . But I now know you better. . . . I am now convinced that a better appointment could not have been made." Clay came to feel, as he said, that the ermine so long worn and honored by Marshall had fallen upon a most worthy successor. It would have been a difficult undertaking, in the best circumstances, to succeed the great Chief Justice, but the acrimony of partisan criticism made Taney's task one which required an exceptional equipment of courage, firmness, and judicial equanimity. Apart from mere partisan bias, there was, indeed, a strong feeling among his opponents that under the new leadership of the court the principle of constitutional construction, which the genius of Marshall had established against vehement and continuous assaults most ably directed, would be undermined and that the essential authority of the Nation would be placed in serious jeopardy. But Taney had been a Federalist, and while his judicial work came to be distinguished for his support, with the force of profound conviction, of the power of the States "over their own internal police and improvement"—a power the exertion of which was especially demanded by economic changes—still he recognized in many notable opinions the importance of maintaining national authority and its supremacy within its constitutional domain.

Thus, in the case of *Holmes* v. *Jennison*,[1] Chief Justice Taney, dealing with the question of extradition, emphasized the exclusive power of the United States in foreign relations. "It was one of the main objects of the Constitution," said he, "to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities. The power now claimed for the states, is utterly incompatible with this evident intention; and would expose us to one of those dangers against which the framers of the Constitution have so anxiously endeavored to guard." In *Martin* v. *Waddell's Lessee*,[2] the Chief Justice in determining the extent of the authority of New Jersey over lands under tidewaters held that the rulings of the State Court upon the construction of early instruments, not framed by the people of New Jersey, but were royal charters under which rights were claimed by the State on the one hand and private individuals on the other—although the decision of the State Court was entitled to great weight—did not bind the federal tribunal. Taney concurred in the ruling in *Dobbins* v. *Erie County*,[3] that a State had no power to tax the compensation fixed by federal law of a federal internal revenue officer. While as his biographer, Dr. Steiner of this State, has observed, "Taney never got over the feeling that the commerce clause should be somewhat narrowly construed," it should not be overlooked that the Chief Justice took part in the decision in *Cooley* v. *Port Wardens*,[4] which, after the uncertainty caused by the diverse opinions delivered in the *License Cases*[5] and the *Passenger Cases*,[6] established a principle which has been of the greatest value in solving the difficult problems constantly recurring in the effort to maintain in relation to the highly important subject of commerce the constitutional balance between state and national authority. Said the Court, in the *Cooley* case, speaking through Mr. Justice Curtis, with the concurrence of the Chief Justice: "Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question (pilotage), as imperatively, demanding that diversity which alone can meet the local necessities of navigation." And this consideration of a question pertaining to navigation led to the announcement of the more comprehensive doctrine that has since prevailed: "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." It may also be recalled that one of the early appearances of Taney as counsel before the Supreme Court of the United States was in the case of *Brown* v. *Maryland*, in 1827,[7] the "original package" case, where the Court, rejecting Taney's contention, decided that the Maryland statute imposing a license tax upon importers

1. 14 Peters, 540.
2. 16 Peters, 367.
3. 16 Peters, 435.
4. 12 Howard, 299.
5. 5 Howard, 504.
6. 7 Howard, 283.
7. 12 Wheaton, 419.

was unconstitutional as a tax on imports and an interference with foreign commerce. Thirty-four years later, in deciding *Almy* v. *California*,[8] which held a state stamp tax on bills of lading of commodities transported from the State to be unconstitutional as a tax on exports, Chief Justice Taney followed the decision in *Brown* v. *Maryland*, in opposition to the position he had taken as counsel, and commented upon Chief Justice Marshall's opinion as showing that the former case had been "carefully and fully considered by the Court."

With respect to the admiralty jurisdiction, Chief Justice Taney was even more "national" than Marshall himself, and the decision of the Court in the case of the *Genesee Chief*[9] departing from the views of Marshall and Story, recorded an advance which has been called revolutionary in the conception of Federal power. The Court decided, in a powerful opinion of the Chief Justice, that the jurisdiction of the admiralty courts of the United States extended over navigable waters, although not tidewaters (thus embracing, for example, the Great Lakes), when commerce is carried on between different States or with a foreign nation. "Now," said Chief Justice Taney, "there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason." In this substitution of sound reasoning based upon essential national interests, in place of an ultra conservative adherence to the precedents of English law established under different conditions, Taney was at his best.

It is unfortunate that the estimate of Chief Justice Taney's judicial labors should have been so largely influenced by the opinion which he delivered in the case of *Dred Scott*.[10] It would be futile at the present time to re-examine the circumstances and consequences of that historic controversy. It should be said, however, that the charge, which formed part of the violent and malignant attack upon the decision, that it was the result of a conspiracy or political bargain had not the slightest foundation. Whatever may be said of the merits of the case, or of the scope of the Court's determination, or of the reasoning employed, there can be no doubt of the integrity of the members of the Court and of the sincerity of the action of the Chief Justice, who thought he was rendering a national service. In looking at the background of the decision, it is apparent that there was a fundamental error in the supposition that the imperious question which underlay the controversy could be put at rest by a judicial pronouncement. That issue was beyond the resources of the forum or of the legislature—it was an issue definitely settled by the arbitrament of war. With that settlement, the *Dred Scott* case passed into history as an event pregnant with political consequences of the highest importance, and having a most serious effect upon the prestige of the Court, chiefly because of the unbridled criticism induced by the temper of the times, but having a negligible influence upon the development of the constitutional jurisprudence with which we are now concerned.

At this time, in calm retrospect, rejoicing in national unity and in the collaboration of a peaceful people, we may make a juster appraisement than was possible in the passionate days of civil strife. Nothing could be more unjust than to estimate the judicial work of the days of Taney by a disproportionate emphasis upon the decisions which were called forth by the vexed questions growing out of the institution of slavery and the prospect of its extension. Rather I should like to take this opportunity to recognize the important service of Chief Justice Taney in setting forth principles that are guiding stars in constitutional interpretation, to some of which I have already alluded.

At once, upon taking office, the Chief Justice was confronted by the long standing controversy over the Warren Bridge between Boston and Charlestown, Massachusetts, presenting the question whether the contract contained in a corporate charter providing for a toll bridge was impaired by a later grant to another corporation of the right to build a parallel bridge. The case was argued by the most distinguished counsel and aroused the keenest interest. Against strong dissent the new Chief Justice sustained the statute under review,[11] laying down the principle that, in the absence of express provision, a grant by the State of exclusive privileges was not to be inferred. While vigorously attacked at the time, the soundness of this principle, and its importance to a developing country, have been generally recognized. The forward look of Taney may be noted in his words describing the consequences of a different decision: "We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every part of the civilized world. Nor is this all. The Court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent."

This freedom of development was again aided by the opinion delivered by the Chief Justice in *Bank of Augusta* v. *Earle*,[12] holding that, in the absence of legislation to the contrary, the consent of a State upon the principle of comity would be presumed to the making of contracts within its borders by a corporation of another State. To Justice Story, who had vigorously dissented in the *Warren Bridge case*, Taney's opinion in the case of the *Bank of Augusta* gave no little gratification which he emphasized in a letter to the Chief Justice, saying that the opinion did "great honor to yourself, as well as to the Court." To those who found it difficult to understand the effort of the Justices of the Court to deal with each case in an objective spirit, and to declare the law conscientiously and with judicial independence, the decision gave "consolatory reflection" that "the fears of judicial radicalism had not been realized." Indeed, the apprehension that the constitutional protection against the impairment of contracts had been seriously weakened by the decision in the *Warren Bridge* case was proved to be unfounded by the opinion of Chief Justice Taney

8. 24 Howard, 169.
9. 12 Howard, 443.
10. 19 Howard, 393.
11. 11 Peters, 420.
12. 13 Peters, 519.

in *Bronson* v. *Kinzie*.[13] That decision held invalid a state statute which was representative of a popular class of legislation endeavoring to succor debtors in a period of extreme economic depression by changing the rights of mortgagees. The views of the Chief Justice on the importance of the reserved powers of the State were not open to question, but with notable courage he also maintained against much clamor the constitutional safeguard against impairment of the obligation of contracts, observing in his opinion that the purpose of the constitutional provision was not "to protect a mere barren and abstract right, without any practical operation of the business of life"; that it was "to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the Constitution of the United States." This decision, however, evoked opposition so intense, that it was now a Senator from Illinois who proposed an amendment to the Constitution prohibiting the Supreme Court from declaring void any Act of Congress or any State regulation on the ground that it was contrary to the Constitution of the United States. Later, in 1848, when the Court in *West River Bridge Co.* v. *Dix*[14] sustained the state power of eminent domain, which had been exercised with respect to a toll bridge, it was recognized that the Court's views as to the maintenance of contracts did not lead to the denial of state power appropriately exercised. A few years thereafter, in *Ohio Life Insurance and Trust Company* v. *Debolt*,[15] Chief Justice Taney strongly upheld the principle that corporate privileges, that case being one of tax exemption, were not to be regarded as conferred by implication. His point of view with respect to corporate charters was emphasized in words frequently quoted: "For it is a matter of public history, which this Court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, and other corporations, is drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called to act. On the other hand, those who accept the charter have abundant time to examine and consider its provisions, before they invest their money. And if they mean to claim under it any peculiar privileges, or any exemption from the burden of taxation, it is their duty to see that the right or exemption they intend to claim is granted in clear and unambiguous language." Where the grant of a particular privilege or exemption was, as he thought in the *Piqua Bank case*,[16] "too plain to admit of any other construction," he sustained it. Thus did Chief Justice Taney seek to maintain the constitutional balance.

In another field, the opinion delivered by the Chief Justice for the Court established the important doctrine that the Court will not undertake to decide political questions and that controversies under the constitutional guaranty of a republican form of government are for the consideration and action of the Congress. It is true that Taney sought to carry the application of the principle too far when in the earlier part of his service he opposed the view that the Court had jurisdiction of a boundary dispute between States,[17] a jurisdiction which has since been frequently exercised to great public advantage. But in the contest arising out of the Dorr rebellion in Rhode Island, the principle that the Chief Justice held so tenaciously was applied in dramatic circumstances.[18] That was a case full of opportunities for the emergence of the political views supposed to be entertained by the majority of the members of the Court, but the decision disregarded the wishes of party and recorded the triumph of dispassionate judicial deliberation. It was a contest in which the fundamental principles of popular government were thought to be involved, and intense feeling had been aroused among its champions. On the other side were the sturdy opponents of Loco-Focoism. But, said Chief Justice Taney, the question of the legitimacy of the government in the State was a political one upon which the Court had no authority to pass. "For," said he, "as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; . . . Yet the right to decide is placed there, and not in the courts." Thus the Court maintained the surest safeguard of its appropriate jurisdiction by refusing to become entangled in political controversies with which it had no concern. This salutary doctrine was recently applied by the Court in an opinion by Chief Justice White in the *Oregon* case, where the Court refused to deal with a controversy arising out of the adoption in that State of the initiative and referendum.[19]

Chief Justice Taney had deep-seated convictions as to the constitutional right of personal liberty, and even in the stress of civil war, and at the risk of violent abuse, to which, indeed, he was subjected by those whose excess of patriotism outran their intelligence, he maintained that right against the Executive, deciding (when sitting in the Circuit Court in 1861) that the suspension of the writ of habeas corpus had been beyond the powers of the President.[20] The Chief Justice was then eighty-four years of age. He had suffered during the years following the *Dred Scott* case the gravest assaults upon his judicial action and personal character, but, while frail in body and deeply grieved, he was still fearless in spirit, vigorous in mind, and unshaken in will. He was ever ready without hesitation to do his duty as he saw it. It was after his death that the principles which he had set forth were vindicated by the pronouncement by the Supreme Court in the *Milligan* case[21] which buttressed individual rights with the memorable declaration: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. . . . Martial

13. 1 Howard, 311.
14. 6 Howard, 507.
15. 16 Howard, 416.
16. 16 Howard, 392.
17. 12 Peters, 752.
18. 7 Howard, 1.
19. 223 U. S. 118.
20. Tyle's Memoir, Appendix, p. 646.
21. 4 Wallace, 2.

CHIEF JUSTICE HUGHES and GOV. RITCHIE of MARYLAND, Painting at right shows CHIEF JUSTICE TANEY Administering oath of office to PRESIDENT LINCOLN

BUST of CHIEF JUSTICE TANEY Recently Unveiled at FREDERICK MD.

OLD TANEY HOME at FREDERICK MD. Preserved as a NATIONAL SHRINE

KITCHEN of OLD TANEY HOME at FREDERICK MD.

rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

The crown of the judicial career of Chief Justice Taney is found, I believe, in the opinion he delivered for the Supreme Court in *Ableman* v. *Booth*, in 1859.[22] The case grew out of the violation of the fugitive slave law, but the permanent importance of the decision lay in its relation to the maintenance of the authority of the federal judiciary. Booth, convicted in the federal court for violation of the federal law, had been released on writ of habeas corpus by the Supreme Court of Wisconsin which pronounced the federal law invalid. The hostility to the Supreme Court of the United States, and deliberate and open antagonism to its authority, which had been proclaimed in earlier days in the South, and had found expression in Ohio and California, were now voiced in Wisconsin and elsewhere under the stress of anti-slavery sentiment. In most forcible language and with luminous reasoning, Chief Justice Taney's opinion set forth the essential supremacy of the federal tribunal within its sphere under the Constitution and laws of the United States. "The Constitution," said he, "was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; . . . and that, in the sphere of action assigned to it" (the General Government), "it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established, and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals." Maintaining this postulate of the Constitution, he found in it nothing in derogation of the dignity of sovereign States which had entered the compact of the Union; on the contrary, he said, "the highest honor of sovereignty is untarnished faith." In this eloquent and uncompromising utterance, upholding the authority of the Court at a time of extreme passion and agitation, Chief Justice Taney discharged unflinchingly the supreme duty of his office.

In this hour of tribute by those who prize the happy traditions of this community, I can do no better than to recall the appraisal of an associate of the Chief Justice who in the peculiar intimacy of the labors of the Court knew the quality of Taney's work better than others, whether friends or critics. I quote, not the words of a political supporter, but the estimate of Justice Benjamin R. Curtis of Massachusetts, one of the ablest men who has sat upon the Bench, and one who had strongly dissented from the decision of the Chief Justice in the case of *Dred Scott*. Said Justice Curtis in his remarks on the death of Taney: "When I first knew him, he was master of all that peculiar jurisprudence which it is the special province of the courts of the United States to administer and apply. His skill in applying it was of the highest order. His power of subtle analysis exceeded that of any man I ever knew; a power not without its dangers to a judge as well as to a lawyer; but in this case, it was balanced and checked by excellent common sense and by great experience in practical business, both public and private. . . . For it is certainly true, and I am happy to be able to bear direct testimony to it, that the surpassing ability of the chief justice, and all his great qualities of character and mind, were more fully and constantly exhibited in the consultation-room, while presiding over and assisting the deliberation of his brethren, than the public knew, or can ever justly appreciate. There, his dignity, his love of order, his gentleness, his caution, his accuracy, his discrimination were of incalculable importance. The real intrinsic character of the tribunal was greatly influenced by them, and always for the better. . . . He was as absolutely free from the slightest trace of vanity and self-conceit as any man I ever knew. . . . The preservation of the harmony of the members of the court, and of their good will to himself, was always in his mind."

With the passing of the years, and the softening of old asperities, the arduous service nobly rendered by Roger Brooke Taney has received its fitting recognition. He bore his wounds with the fortitude of an invincible spirit. He was a great Chief Justice.

22. Howard, 506.

Symposium on Anti-Trust Laws at Columbia

A symposium on the anti-trust laws will be conducted at Columbia University, under the auspices of the Law School of that institution, on Dec. 1, 4, 8, 10, 15 and 17. Sessions will begin at 4:30 P. M. each day. President Nicholas Murray Butler will preside at the first session, at which an address will be made on "The Anti-Trust Laws and the Social Control of Business" by Prof. Walton H. Hamilton of Yale University. Dean Smith, of the Columbia Law School will preside at the session on Dec. 4 and Gilbert H. Montague, member of the New York Bar, will speak on "Proposals for the Revision of the Anti-Trust Laws." Presiding officers and speakers and subjects for the other sessions are as follows: Dec. 8—Hon. John W. Davis, presiding; Walker D. Hines, of the New York Bar, to speak on "The Anti-Trust Act of 1890 and Trade Associations." Dec. 10—Howard Lee McBain, Dean of the Graduate Faculties, Columbia University, presiding; Prof. Myron W. Watkins, of New York University, and Hon. Abram F. Myers, former member of the Federal Trade Commission, to speak on "The Federal Trade Commission and the Anti-Trust Laws." Dec. 15—Mr. Huger W. Jervey, of the School of International Affairs at Columbia, presiding; Mr. Arthur R. Burns, Lecturer on Economics at Columbia, to speak on "The Economic Aspects of Industrial Mergers," and Associate Professor A. A. Berle, Jr., of the Columbia Law School, on "The Corporate and Financial Aspects of Industrial Mergers." Dec. 17—Judge Learned Hand, presiding; Assistant Professor Milton Handler, of the Columbia Law School, to speak on "The Legal Aspects of Industrial Mergers." There will be a discussion after the addresses at each session.

THE WORLD COURT AND THE AUSTRO-GERMAN CUSTOMS RÉGIME

The Problem Before the Court—Preliminary Question of Judges Ad Hoc—Nature of the Court's Division—Analysis of the Three Opinions—Were There Blocs in the Court?—Significance of the Court's Role in This Case

By Manley O. Hudson
Bemis Professor of International Law, Harvard Law School

WHEN the Austrian and German governments announced, on March 19, 1931, that they had agreed to enter into negotiations to assimilate their tariff policies on the basis of a protocol drawn up at Vienna on that date, the world was confronted with a first-class political sensation. French opinion had been very much opposed to an *Anschluss* of Austria and Germany. An article in the Weimar Constitution of Germany referring to a possible union with Austria had been suppressed in 1919, and such a union had been proscribed by the treaties of peace of that year. Some of the new states, also, particularly Czecho-Slovakia, had been apprehensive of an encirclement by an Austro-German Union. It was precisely the kind of situation which would have created grave danger in the days before the War.

Action by the Council

A few weeks after the announcement, the British Government, referring to doubts as to whether the Austro-German protocol was compatible with Austria's international obligations, asked that the question be placed on the agenda of the Council of the League of Nations. It was considered by the Council at its sixty-third session, on May 18 and 19, and the French opposition was expressed before the Council in a memorandum dealing with the proposed union on political, economic, and legal grounds. Fortunately, the advisory jurisdiction of the Permanent Court of International Justice exists to aid the Council in such cases, and on May 19 the Council requested the Court to give an advisory opinion on the question whether the proposed regime would be compatible with Article 88 of the Treaty of St. Germain and with the Protocol signed at Geneva in 1922 when the League of Nations scheme for the financial reconstruction of Austria had been adopted.

Obligations of Germany and Austria

No question was put to the Court as to the compatibility of the proposed regime with the obligations of Germany, though by Article 80 of the Treaty of Versailles Germany had agreed to respect "strictly" the independence of Austria, and it was further stipulated that this independence would be inalienable without the consent of the Council of the League of Nations.

The Treaty of St. Germain contained a similar stipulation, to which was added "consequently" an undertaking by Austria "to abstain from any act which might directly or indirectly or by any means whatever compromise her independence." To this, the Protocol of 1922 added emphasis by referring to the Treaty of St. Germain, and by requiring Austria to "abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise" her independence, and to abstain from violating "her economic independence by granting to any State a special regime or exclusive advantages calculated to threaten this independence."

Procedure Before the Court

Though the question was before it for an advisory opinion and not for a judgment, the Court dealt with it as it would have dealt with a suit between States. Every state which is entitled to appear before the Court—and this includes the United States—was notified of the request, and an additional special notification was sent to each of the states parties to the Treaty of St. Germain or to the Protocol of 1922. Opportunity was thus given to most of the states of the world to place their views before the Court, and Austria, Czecho-Slovakia, France, Germany, and Italy availed themselves of the privilege. July 1, 1931, was fixed as the date by which written statements, which correspond to briefs, were to be filed, and the five states first presented their views in that form.

As the Council had requested that the Court deal with the question "as a matter of urgency," it was advanced on the list of cases pending, and the Court dealt with it at its twenty-second session, which began on July 16. For the first time in its history, the Court was composed of fifteen judges at this session.

Question of National Judges

A preliminary question arose whether *ad hoc* judges might be appointed for this case. France, Germany, and Italy had nationals among the judges on the bench; but this was not true of Austria and Czecho-Slovakia, and these states requested that they be allowed to appoint national judges to sit *ad hoc*. The Statute of the Court (Article 31) provides that if the Court includes upon the bench no judge of the nationality of a party, a national judge may be appointed, and that should there be several parties in the same interest, they shall for this purpose be reckoned as one party only. The Rules of Court (Article 71) make this provision applicable when the Court is giving an advisory opinion relating to a dispute. The questions arose, therefore, whether in applying this article, Austria was to be deemed to be in the position of a party "in the same interest" with Germany, and whether Czecho-Slovakia was to be deemed to be in the position of

a party "in the same interest" with France and Italy. After hearing arguments, a majority of the Court answered these questions in the affirmative, thus denying to Austria and Czecho-Slovakia the privilege of appointing judges *ad hoc*, on the ground that "all governments which, in the proceedings before the Court, come to the same conclusion, must be held to be in the same interest for the purposes of the present case." A minority of five judges —President Adatci and Judges Rostworowski, Altamira, Anzilotti and Wang—thought, however, that Austria was a party to the dispute before the Court while Germany was not, and hence that Austria should have been permitted to appoint a national judge.

Oral Proceedings

Arguments were presented to the Court on behalf of the five states from July 20 to August 5, lasting for fourteen days. Never in the ten years of its history has the Court heard a more eminent group of counsel: Professor Victor Bruns for Germany, Professor Erich Kaufmann for Austria, M. Paul Boncour and Professor Jules Basdevant for France, M. Krcmár for Czecho-Slovakia and M. Massimo Pilotti and M. Vittorio Scialoja for Italy. Following the practice recently agreed upon, several questions were addressed to counsel by members of the Court during the hearings.

The Advisory Opinion

After the conclusion of the oral arguments, the Court deliberated for a whole month, and its opinion was handed down on September 5.[1] The opinion carries less conviction because of the divisions among the judges. Eight members of the Court, out of fifteen, declared that the proposed customs regime would violate the Geneva Protocol of 1922; but seven of this eight—Vice President Guerrero and Judges Rostworowski, Fromageot, Altamira, Anzilotti, Urrutia and Negulesco—wished to go further to declare that it would also violate Article 88 of the Treaty of St. Germain. A minority of seven judges—President Adatci and Judges Kellogg, Rolin-Jaequemyns, Hurst, Schücking, van Eysinga and Wang—wished to say that the proposed regime was consistent with both instruments. Hence the opinion of the Court was entirely satisfactory to but one judge—Judge Bustamante; fourteen judges wished it to be different. Nor did the opinion answer the question actually put by the Council, for that question related both to the Treaty of St. Germain and to the Geneva Protocol, and the conclusion of the majority opinion related solely to the latter instrument.

In addition to the opinion of the Court, which represented the views of eight judges, a dissenting opinion by seven judges was published, as well as a concurring opinion by Judge Anzilotti. As it represents the opinion of one man and did not therefore have to be a composite work, Judge Anzilotti's opinion has a structure and a consistency which the others lack, and it carries persuasion in greater degree.

Views of the Majority

The majority opinion is prefaced with the general observation that "Austria, owing to her geographical position in central Europe and by reason of the profound political changes resulting from the late war, is a sensitive point in the European system." Hence, her existence is "an essential feature of the existing political settlement." In stipulating for her independence, the treaties require "the continued existence of Austria within her present frontiers as a separate state with sole right of decision in all matters economic, political, financial, or other." The Geneva Protocol of 1922, to which Spain, which was not a signatory to the Treaty of St. Germain, had adhered, is "capable of independent application." It creates for Austria "special undertakings from the economic standpoint." The projected "régime of customs union constitutes a 'special régime'" and it "affords Germany, in relation to Austria, 'advantages' which are withheld from third Powers." If the régime to be established by Germany and Austria be considered as a whole from the economic standpoint, "it is difficult to maintain that this régime is not calculated to threaten the economic independence of Austria," though it does not amount to an "alienation of Austria's independence." It was therefore held that the proposed régime would be incompatible with the Geneva Protocol of 1922.

Views of the Minority

The dissenting judges agree with the majority as to the nature and extent of Austria's obligations, and they agree that the proposed regime would not constitute an alienation of her independence. But they fail to find in the majority's opinion "any explanation as to how and why that regime would threaten or imperil Austria's independence." They insist that "the Court is not concerned with political considerations nor with political consequences." The Court is called upon to deal with a "purely legal" question. The Protocol of 1922 was only a "reaffirmation of the obligations contained in Article 88" of the Treaty of St. Germain. "If the proposed regime can be said to be one which is 'calculated to threaten' the independence of Austria, it is not the establishment of the regime but the consequences resulting from its establishment which would make that regime incompatible with Austria's obligations." The consequences depend on the specific provisions of the arrangement. In this case there is no fusion of customs territories or of customs services; policies are merely assimilated. "The Government of the one state is in no way subordinated to the Government of the other." If Austria should find her independence imperilled, "she can always avoid that danger by denouncing the treaty." Hence it is concluded that no provision of the Vienna Protocol is inconsistent with the maintenance of Austria's position as a separate and independent state.

View of Judge Anzilotti

While he agreed with the conclusion of the majority, Judge Anzilotti's point of view was "widely different." Article 88 of the Treaty of St. Germain had been adopted "in the interests of Europe as a whole." Austria is bound not only to abstain from acts of alienation of her independence, but also to abstain from acts which "would have the effect of exposing that independence to danger." Judge Anzilotti agrees with the minority view that

1. For the text of the opinion, see Publications of the Court, Series A/B, Fascicule No. 41.

the Geneva Protocol did not add to Austria's then existing obligations. The Court must deal with this particular customs union, and its answer depends on considerations which are mostly political and economic. "In view of the great disproportion in the economic strength of Germany and Austria, it must be regarded as reasonably probable that Austria's economic life would sooner or later become dependent upon Germany's." The effect of the proposed regime would be to "strengthen the movement towards the incorporation of Austria within a single big German state." Hence it "might compromise Austria's independence," and would violate both the Treaty of St. Germain and the Geneva Protocol of 1922.

The Line-Up of the Judges

There has been some comment[2] to the effect that the judges from all so-called Latin countries aligned themselves in this case in the group which composed the majority of the Court, while the judges from North European, North American, and Asiatic states aligned themselves in a group which composed the minority. While there is some basis for an explanation of the division in the Court on geographical grounds, it does not bear close analysis and no conclusion should be drawn from it. There were no "blocs" in the Court, and the same division may never occur again. A Belgian judge is in the minority, and a Polish judge is in the majority. If one expects the American, Dutch, English, and German judges to be in accord, this could hardly account for the presence of the Belgian, Chinese, and Japanese judges in the same group.

It has also been said in America that the judges from countries closely identified in policy with France formed the majority of the Court; but neither is this explanation convincing. The Italian judge can hardly be thought to be over-friendly to France, nor the Colombian, Cuban, and Spanish judges; and if the Salvadoran judge has held a diplomatic post in Paris, so has President Adatci, who took an opposite view.

It is to be noted, however, that of the three judges on the bench from countries represented before the Court, each reached conclusions which agreed with those advanced by the Government of his own country. There have been cases before the Court in which this was not true. Even if the contrary is thought to be a more desirable result, the situation in this case does not warrant a questioning of the judges' capacity for independent thought and action.

Is the Opinion Political?

It seems to be a popular view, also, that the Court's action in this case was not judical but political. Though no suggestion is made that the judges yielded to pressure exerted by any government, the opinions disclose that political considerations were taken into account, and that the conclusions were due in part to appreciations of the political factors in the question put to the Court. Whether this is to be praised or condemned will depend upon one's view of the judicial function. In our national courts, a refusal to take account of the social and political conditions to which law must be applied, has produced some of the sharpest criticism of our legal system. Conceptions such as liberty of contract were responsible for some of the most objectionable features of our constitutional law, where courts applied them in disregard of well-known economic facts and in an attitude of sticking to the "pure law." An international court might similarly build a law in disregard of the political factors which condition its application, but it would almost certainly lack both the appearance and the substance of reality.

In this case, the question before the Court could hardly have been answered without some appreciation of the political situation which led to the treaties themselves. Judge Anzilotti frankly admitted that this was what the Court had to do. The majority took some account of it, also. The minority said that both political considerations and political consequences were outside the competence of the Court; yet they referred to political explanations given to the Council of the League of Nations, to the political origins of the treaty provisions, such as Article 61 of the German Constitution of Weimar, and to the economic and political situation in which the Protocol of 1922 was negotiated.

The Court was dealing with a question which was both legal and political. It was given three texts to interpret, it was called upon to say whether a certain course of action "might compromise," or was "calculated to threaten," the independence of Austria. It would not be surprising to have a difference of opinion on that question, even among judges who held exactly the same philosophy of law.

Significance of the Court's Opinion

Two days before the opinion of the Court was handed down, the German and Austrian governments announced to the Commission of Enquiry for European Union, meeting in Geneva, that they did not intend to proceed with the proposed negotiations. This robbed the question submitted to the Court of its immediate practical importance, though the opinion may serve some future purpose as a determination of the meaning of the treaty provisions.

Aside from the fact that the issue is no longer vital, however, the role of the Court in this case illustrates the tremendous gain which international organization represents in the modern world, and the value of the Court's advisory function. If a similar political sensation had been produced in the years before 1914, it would have meant a serious crisis, for handling which no machinery would have been available. Such was the Agadir incident in 1911. In 1931, however, the Austro-German announcement was promptly brought before the Council of the League of Nations. A method was at hand for dealing with it. A place was appointed, with a procedure established, where it could be considered by responsible representatives of the interested Powers.

Yet the Council might be helpless in some cases if it did not have the possibility of seeking the aid of the Court by requesting an advisory opinion. Almost every political dispute involves legal questions, and unless they can be cleared away there is little chance of progress to be made by an agency of conciliation in dealing with political issues. The Council is composed of politicians, not of lawyers. Its power is greatly enhanced because it may ask the Court for an authoritative opinion on legal questions which arise. The process always takes time, and time is the enemy of precipitate action. In this case, three and a half months elapsed after the request was made before the Court gave opinion, and that interval was just enough to enable the politicians to reach a solution without having the opinion of the Court before them. The very existence of the Court facilitated a handling of the problem, and aided in reaching the solution which has for the time being prevailed.

2. Particularly, by Senator Watson in the *New York American*, October 11, 1931.

FREDERICK W. LEHMANN—1853-1931

By Isaac H. Lionberger
Member of the St. Louis Bar

FREDERICK W. LEHMANN was born in Prussia, February 28, 1853. A few years later his father moved to Ohio. Lehmann left home when he was a boy and after a brief sojourn with an Indiana farmer, drifted westward to Iowa, where he resided until 1890. Here he was in turn a sheep-herder, newsboy, scholar in a local academy and apprentice to a lawyer. In 1873 he was admitted to the Bar. Six years later he married Nora Stark. In 1890 he moved to St. Louis and became a member of the law firm of Boyle, Priest & Lehmann. After the dissolution of this firm he formed a partnership with his son Sears, and continued to practice until his last illness. He died in St. Louis, September 12th, 1931, leaving a widow and three sons.

Frederick W. Lehmann

The remarkable events of his life may be more briefly told: This vagrant lad became in the course of time influential in the affairs of two states, President of the American Bar Association, Solicitor General of the United States and a doctor of laws in two universities.

He was lucky born; vigorous in mind and body; bold, ambitious, industrious, scrupulously honorable; and like Jackson, Houston and Lincoln, was educated in that best of schools called the frontier of America.

Iowa in the '60's was sparsely peopled by hardy adventurers from the eastern states who went west to settle upon the rich and cheap lands then offered for sale on easy terms. The communities were widely separated, yet at the county courts and political conventions able men met, discussed public affairs, engaged in forensic debate and selected candidates for office. In such a school Lehmann found not only instruction and inspiration, but opportunity for the display of his remarkable qualities. His first speech made him politically; his first argument before a jury assured his success at the bar. A lover of liberty, he opposed prohibition, then on trial in Iowa, and helped to overthrow it. A Democrat and free-trader, he joined the minority party and helped it to victory. His eloquence at the bar attracted the attention of the Wabash Railroad Company and he was invited to join its general staff in St. Louis.

At that time the Bench and Bar of St. Louis were composed of men of remarkable ability and highest character, and among these Lehmann rapidly achieved distinction. Public dinners at which distinguished strangers and citizens were entertained, were frequent; the Bar met from time to time to commemorate the virtues and services of those who had died; and the political campaigns involved issues of the greatest economic importance. On every such occasion Lehmann was conspicuous. His mind was quickly apprehensive and he had a prodigious memory. An earnest student of public affairs, he illustrated every question he discussed. All the resources of his experience and learning were at the tip of his tongue. He spoke instinctively and easily but at the same time with an intensity of feeling which stirred to the depths the heart of everyone who heard him.

He made friends quickly. It was then the custom of the lawyers and men of affairs to meet for lunch, and to these symposia Lehmann was introduced and gladly admitted. Here he met also newspaper men and politicians, and in a short time became intimately acquainted with those who controlled the affairs of the city.

He joined the University Club at a time when it was chiefly composed of college graduates, and among these he made many of the friendships of his life. To this club for many years he was wont to resort after business hours, and in the course of time became one of its most cherished institutions.

His success at the local bar won him reputation abroad and resulted in his election to the presi-

dency of the American Bar Association. Later he was chosen by President Taft to be Solicitor General of the United States and met in Washington the ablest men of the country. The candor as well as the eloquence of his arguments soon won the confidence of the Supreme Court. When his case seemed to be unjust he said so frankly and refused to fortify what he conceived to be wrong by specious argument. After his retirement he was in active practice until his final illness, and won many notable victories.

Of his personality I speak with diffidence. He was a compact, sturdy man and resembled a Norman church firmly planted, rough-hewn, round-arched and austere yet filled with dim religious light and stools for prayer. Utterly frank and generous, he made friends of all sorts of people, even of those whose convictions he did not share. He spoke with passionate eloquence but never with animosity, and if he blundered he was quick to see his error. I have never known him to be offended by correction.

He was not only an omnivorous reader, with a prodigious memory, he was an agreeable talker. To know him was a liberal education. He not only read books but coveted them and devoured them, and his library was filled with rare editions nobly bound. He knew more of American history than many a writer of it. His taste was catholic. He was as good a judge of poetry as of philosophy and politics, and his talk was always interesting. Never self-conscious, he was at home in every company; and being equal to any man, he got the best out of every man. Politicians, scientists, preachers, literary people of any sort delighted in his conversation. His companions feared nothing so much as that he might leave off.

The following incident reveals the charm of his conversation. A Methodist clergyman of eighty, invited on a hot June night to come to the Club and take a glass of lemonade for his refreshment, was introduced to Lehmann and lingered until daylight. When he left he turned to Mr. Lehmann and said, "I shall find it hard to explain to my congregation and my wife the indiscretion of which I have been guilty, and yet I am heartily grateful to you, sir. I have spent my life among the sorrowful: I did not know there were agreeable men in the world."

It was easy to know him and easy to love him. Never irritating, never disappointing, never otherwise than boldly frank, he did not take the trouble to be reticent: what you wished to know of him he would tell you candidly and simply. Such a man was never out of place. Wherever he met men together to talk, Lehmann was welcome. Among his friends he reckoned every man of influence in this community and every man of extraordinary intelligence.

He died after a lingering illness. Several years before his death but when he was already infirm, the following tribute, signed by Chief Justice Taft of the Supreme Court of the U. S., John W. Davis, once Solicitor General, all the judges of the Supreme Court of Missouri, the judges of the Federal Circuit Court of Appeals and District Court, the judges of the State Circuit Courts and a great many members of the Bar of the city of St. Louis, was tendered to him.

"The subscribers, judges and members of the Bar, salute you and wish you all things according to your desire.

"During the period of your residence among us, we have observed with increasing satisfaction your manly progress to a merited distinction; and reflect with pride upon the fact that you have never stooped to the meaner arts by which ambition strives for sordid success, but by fair-mindedness, great learning and eloquent sincerity have won the victories which have marked your career.

"That your reputation should have become national was inevitable. You brought to the office of Solicitor General the qualities which won you distinction at the Bar. If you thought the Government wrong, you dared to say so and, laying before the Court the evidence which constrained your conviction, by your magnanimity at once promoted the cause of justice and won the esteem of the Supreme Court.

"We wish, however, to express more than approbation of your probity, learning and eloquence: we mean to thank you as lawyers for the credit you have brought to the profession of law. In a time of unscrupulous subordination of lawyer to client, you have held aloft the ancient banner of our Tribe, "Leges ad civium salutem conditae sunt," and by your sturdy insistence upon the righteousness and dignity of our calling have made evident the ideals to which we aspire; and so reclaimed for us some measure of that public esteem which of right belong to us. For these services we are grateful.

"As citizens we are not less grateful to you. On every occasion you have brought to the discussion of public affairs a wide knowledge, wisdom, sincerity and persuasive eloquence; and if at times your influence could not stay the torrents of excited public opinion, it never failed to reach the hearts and minds, and affect the conduct, of thoughtful men.

"Under all circumstances, at all times, your life has been influential for good. Your conversation has been so, and your example. Young men have been taught by you to be diligent in order that they may be learned, to be learned in order that they may be wise, and to be honorable in order that they may deserve the esteem of their fellows.

"Moved by these considerations, we, brothers of the Bar, tender to you this memorial of our esteem, in the hope that it shall add to the happiness of your declining years."

He replied in a letter to the Press: "As my health is such that I cannot convey to each of the subscribers my appreciation of the generous testimonial presented to me on Christmas Day, I beg you to permit me to make a public declaration of my profound gratitude for a compliment which has indeed added to the happiness of my declining years. The assurance of my friends of the Bench and Bar that in an effort to achieve the aspirations with which I set out I have not altogether failed, reconciles me to many shortcomings. I am too deeply moved to do more than formally express my gratitude. The testimonial was kindly meant; it has answered its purpose. Gratitude shall not die with me: my sons shall remember."

I have tried to speak of him without exaggeration, for he was a simple man and so would be spoken of. Those of us who knew him intimately

were cordially attached to him and have perhaps inclined to ignore his faults and magnify his virtues; but that he had faults I know: otherwise I had not loved him.

I should not conclude this sketch without adding what he would wish to have said. He was lucky born, but he owed much to the city of his adoption. Here he found a congenial and stimulating atmosphere, and we dare claim for this city some share of the praise we now gladly lavish upon him.

A great lawyer, a statesman, an orator, a scholar, a brave and honest man, he lives in the hearts of many of us and shall live while we who knew him survive. He was of great use in the world and many men loved him.

DEPARTMENT OF CURRENT LEGISLATION

Motor Vehicle Statutes: "Hit and Run"; Service of Process on Non-Residents

BY NOEL T. DOWLING
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MOTOR vehicles have furnished the busy legislatures a large order of additional work in the past decade. The legislative product has been notable, not so much perhaps in its quantity as in its range and implications. A considerable part, of course, represents a continuing effort to achieve as full a measure of safety as is attainable in the operation of these instrumentalities which, to say the least, have an immense potentiality for harm.[1] All that is on the preventive side. But not by any means is that the whole legislative story. Statutes on the remedial side have been frequent and they are significant. Legislatures are making new efforts to facilitate redress for the damage done by these instrumentalities.

Taken in the mass, the remedial statutes disclose a growing dissatisfaction with common law methods of dealing with motor vehicle cases as measured by the social results of such methods. Witness, for example, the wide statutory expansion of the doctrine of vicarious liability in order to cast upon the owner more and more of the burden of damage caused by motor vehicles.[2] Witness, again, the social insurance aspects of statutes regarding motor vehicle insurance, voluntary as well as compulsory, with their authorization of direct actions by the injured person against the insurance carrier.[3] True, the new remedies are injected into a system under which liability is imposed in motor vehicle cases only when somebody is at fault. True, also, that actions for damages are still snarled up in a complicated common law tangle of mythical men of ordinary prudence, and abstract rules of contributory negligence, last clear chance, and proximate cause. With all these, along with other ingredients not necessary to be enumerated, thrown together into the court room, it is hardly to be wondered at that too often we have a hit-or-miss disposition of the litigated case entailing as much hardship to the injured party as if he had been the victim of a hit-and-run affair on the road. But signs are at hand that this fault basis of liability is being re-examined and critically appraised; more, that possibly it is now in process of being overturned. Do we not have indications of this in the expansion of vicarious liability, itself a species of liability without fault? What of the articles of the past few years some of them specifically urging abandonment of the fault basis and adoption of the compensation idea of liability for the risk! Bills embodying the compensation principle have been introduced in a number of legislatures. Investigating committees have been set up in a few states to report upon the subject. An extensive investigation has been made by the Committee to Study Compensation for Automobile Accidents, under the chairmanship of Arthur A. Ballantine, Esq.[4]

Meanwhile the legislative mills grind on. It is not the purpose here to undertake a general review of current motor vehicle legislation of a remedial character. Several types of that legislation have been discussed in the Department of Current Legislation in the articles cited above. In the present note we are adding two further types, neither of which had its origin in the past decade but both of which have been the subject of continued statutory treatment in that period.

These types have to do, broadly speaking, with the convenience of plaintiffs in actions for damages caused by the operation of motor vehicles. The first type is concerned (though not solely) with the identification of operators of motor vehicles; the second with service of process on non-resident motorists. Of these in order.

As early as 1910 New York[5] passed a statute of the first type which provided:

> "Any person operating a motor vehicle who, knowing that injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident without stopping and giving his name, residence, including street and street number, and operator's

1. The National Conference on Street and Highway Safety has encouraged this phase of legislation. It has prepared a Uniform Vehicle Code, consisting of four bills, which it recommends for adoption by the States. The Code is gradually finding its way to the statute books.

2 *Automobile and Vicarious Liability*, W. J. Heyting, 16 Am. Bar Ass'n. Journal 225 (1930).

3. *Automobiles and Compulsory Liability Insurance*, by W. J. Heyting, 16 Am. Bar Ass'n. Journal 15 (1931); *The Statutory Liability of Automobile Insurance Companies*, by W. J. Heyting, 17 Am. Bar Ass'n Journal 15.

4. See his article concerning the formation of that Committee and the scope of its studies, in the February (1930) issue of this Journal.

5. Laws of 1910, Ch. 374, §290(3) Highway Law.

license to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer shall be guilty of a felony punishable by a fine of not more than five hundred dollars or by imprisonment for a term of not exceeding two years, or by both such fine and imprisonment."

Later enactments tend to become specific, as illustrated by the following from Indiana[6] in 1929:

"Any person, who while driving or operating a motor vehicle or motor bicycle on any highway in this state, although he may not be at fault, shall strike, wound or injure any human being, or shall meet with an accident whereby any other person receives an injury or the property of any other person is damaged, shall immediately stop, render or offer to render assistance, and give to the injured person or to some person who is with such injured person, or to the owner or person in charge and control of the damaged property, his name, residence address including street number, city or town, county and state, also the license number of said motor vehicle or motor bicycle and produce or offer to produce for inspection, the certificate of registration therefor: Provided, That if such person is either killed or rendered unconscious and there is no other person to whom such person involved in the accident can report, then such person shall report such information to a police or peace officer, or in case no police or peace officer is in the vicinity of the place of such injury or accident, then he shall report such injury or accident to the nearest police station, peace officer or judicial officer."

Utah goes a step further in 1931 by providing[7] that the driver "shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person."

A humanitarian advance is noticeable in these statutes. It may have been thought enough in New York in 1910 to make the bare requirement that the motorist stop and give his name and address. The state of the victim may be such, however, that a name and address would be of little consequence to him; and Indiana, recognizing this grim aspect of the automobile toll, makes specific provision for the case where the person "is either killed or rendered unconscious." It was not long before the idea of "first aid," implicit perhaps in the original stop-and-identify statutes, began to appear explicitly and it now seems to be in process of enlargement as to the duty of the motorist. Maryland[8] indeed pushes forward and requires that, *inter alia*, in case of collision with an *animal* the operator must stop and give his name and render assistance.

This effort to break down the hit-and-run evil has not escaped constitutional objections. It has been contended that to compel the motorist to stop and identify himself was a species of self-incrimination, especially in those circumstances where his conduct in the operation of his car was such as to constitute a criminal offense. This contention was met and rejected by the Court of Appeals of New York in a case[9] involving the statute quoted above.

Speaking for the majority (Hogan, J., dissented), Cullen, Ch. J., said:

"There is one ground upon which, in my opinion, the validity of the statute can be safely placed. The legislature might prohibit altogether the use of motor vehicles upon the highways or streets of the State. That the motor vehicle, on account of its size and weight, of its great power and of the great speed which it is capable of attaining, creates, unless managed by careful and competent operators, a most serious danger, both to other travelers on the highway and to the occupants of the vehicles themselves, is too clearly a matter of common knowledge to justify discussion. . . If the legislature may declare it a crime to use a motor vehicle on the highway under any circumstances, I do not see why it may not equally declare it a crime to so use such a vehicle as to injure anyone in person or property. That, in effect, is a diminution, not an increase, of the criminality it had the power to attribute to the use of a motor vehicle. The provision now before us is but a still further diminution of the statutory inhibition the legislature would be authorized to enact. It does not declare it a crime to operate an automobile on the highway or even that in its operation injury to persons or property shall be crime, but only that failure by the operator, in case of such injury, to identify himself shall be criminal. I cannot see why the greater power does not include the less. Of course, the whole of this argument rests on the proposition that in operating a motor vehicle the operator exercises a privilege which might be denied him, and not a right, and that in case of a privilege the legislature may prescribe on what conditions it shall be exercised."

"Nevertheless," the Court adds, "when we bear in mind not only the great danger occasioned by the use of motor vehicles, but also the fact that the great speed at which they can be run enables the person causing injury to readily escape undetected, leaving parties injured in person or property unable to tell from whom they shall seek redress, I think it involves no violation of public policy or of the principles of personal liberty to enact that as a condition of operating such a machine the operator must waive his constitutional privilege and tell who he is to the party who has been injured or to the police authorities, if, indeed, requiring him to give such information is an impairment of his constitutional privilege, which we do not decide."

This decision rests upon the acceptance of the rule, sometimes called the "greater and lesser power," that the possession of a complete power of prohibition carries with it the lesser power of prescribing conditions upon which the privilege may be exercised.[10] As against this, however, a contrary doctrine has been in process of development, chiefly in the Supreme Court of the United States, and generally spoken of as the doctrine of unconstitutional conditions.[11] Under this doctrine the condition itself must stand an independent constitutional test although the fact that the State has a power of prohibition may be one of the facts to be considered in determining the constitutionality of the condition.

In nearly all of the States which have statutes of this character there is an accompanying provision that a written report of the accident shall be made to a designated officer or department. In general these statutes provide that the reports shall be upon forms prepared by the designated officer and shall contain such information as he may require. The statutes are not uniform as to the uses to which the report may be put: some are silent, others contain definite restrictions.

Variations in the statutes as to the availability of the report in evidence may reflect different views of policy as well as of constitutional power. As in the case of the stop rule, constitutional objections have been raised against the use of the report in evidence, again rested on the privilege against self-incrimination. In at least one court the attack has been successful. The requirement that a full written report be made was held unconstitutional in Ohio a few years ago.[12]

Whatever may be the reason, there is a plain trend in recent legislation to restrict the uses to which the

6. Laws of 1929, Ch. 190, §2, p. 618 Ann. Stat. (Burns Supp. 1929) §10142.
7. Laws of 1931 Ch. 49, Art. IV, §15(c).
8. Laws of 1918, ch. 85, §151, Mc. Ann. Code (Bagby 1924) Art. 56, §196.
9. *People* v. *Rosenheimer* (1913) 209 N. Y. 115, 102 N. E. 530.
10. See (1913) 13 Col. Law Rev. 745; see also, *Ex Parte Knoedler* (1912), 243 Mo. 632, commented on in (1912) 12 Col. Law Rev. 731; and see further, (1928) 28 Col. Law Rev. 971.
11. *Unconstitutional Conditions*, by M. H. Merrill, (1929) 77 U. Pa. Law Rev. 879, cited in (1931) 31 Col. Law Rev. 651, fn. 73, p. 659.
12. *Rembrandt v. City of Cleveland* (1927) 28 Ohio App. 4, 161 N.E. 864. This case was adversely criticised in (1928) 28 Col. Law Rev. 971, and in (1928) 13 Minn. Law Rev. 150.

report may be put. Thus, in the Utah statute of 1931:[13]

"All accident reports made to the department or to any city department under local ordinance shall be without prejudice, shall be for the information of such department and shall not be open to public inspection. The fact that such reports have been so made shall be admissible in evidence solely to prove a compliance with this section, but no such report or any part thereof or statement contained therein shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of such accident."

This provision is substantially the same as that contained in §16 of the Uniform Act, "Regulating Traffic on Highways," recommended by the National Conference on Street and Highway Safety.[14] To hedge the reports about with restrictions of the above character destroys any possibility of aid to the injured party in establishing his case; stops the State from using them in connection with the suspension of the motorist's license; and leaves them valuable mainly for statistical purposes.

When we come to the second type of legislation, however, we find a more pronounced solicitude for the convenience of parties plaintiff. The hit-and-run evil was bad enough when local motorists were involved. It became accentuated with the advent of non-resident motorists. The ease and speed with which the latter could get beyond the jurisdiction put the injured persons at a distinct procedural disadvantage. Statutory schemes were attempted under which service of process could be facilitated even if it might not always be secured.

New Jersey led the way. In 1908 that State passed an act which forbade a non-resident to operate an automobile on the public highways of the State unless, among other conditions, he had authorized a state official to receive service of process for him in actions arising out of the operation of the motor vehicle within the State.[15] A contest was waged over the validity of this statute, the contention being advanced that it violated the commerce clause. The statute was sustained.[16] The basis of the decision has been thought by some to be hardly less broad than that underlying the Rosenheimer case discussed above. At any rate, the decision confirmed the States in the possession of a wide power over interstate motor vehicles.

Massachusetts took the next big step in the exercise of such power. An act of 1923[17] declared that the "operation by a non-resident of a motor vehicle on a public highway" shall be "deemed equivalent to an appointment" by him of a designated public officer as his attorney upon whom process may be served. This difference will be noted: that whereas New Jersey required the non-resident actually to appoint an officer as his attorney, Massachusetts did not require any actual designation but declared that the operation of the vehicle shall be deemed equivalent to such a designation. The price to be paid for the use of the public highway was an assumed agreement that a certain official should be the non-resident's attorney in fact. This statute, too, was attacked on constitutional grounds, and, like its predecessor from New Jersey, was upheld.[18] The Massachusetts act and the litigation over it, especially in the courts of Massachusetts, were widely discussed in the legal periodicals at the time.[19]

This type of legislation has spread extensively since the Massachusetts plan received the approval of the Supreme Court of the United States. At least half a dozen statutes appeared on the subject in 1931. Before they are examined, however, a further difference in the statutes should be noted because of its constitutional as well as practical importance. Some of the statutes, and this is the case in Massachusetts, declare that service of process shall not be deemed complete until a copy of the complaint is sent to the defendant by registered mail and the defendant's return receipt is attached to the papers.[20] Others merely provide that notice shall be sent, but say nothing about registration and return receipts.[21] Still again (as was the case of a New Jersey statute[22] shifting to the Massachusetts method in 1924) there may be no specific provision at all for sending notice to the defendant. This later New Jersey statute came before the Supreme Court in *Wuchter* v. *Pizzutti*[23] and was held to be unconstitutional. Speaking through Mr. Chief Justice Taft the Court said:

"We quite agree, and, indeed, have so held in the Pawloski Case, that the act of a nonresident in using the highway of another state may be properly declared to be an agreement to accept service of summons in a suit growing out of the use of the highway by the owner of the automobile, but the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice."

It is not enough that the defendant actually has notice: the statute, or other provision of law, must *require* that something be done to make it reasonably probable that he will get it. Whether the mere provision that notice be mailed, with no requirement about registration and receipt, contains enough of a safeguard to satisfy due process has not been decided by the Supreme Court, and the state courts are not uniform in their holdings.[24] Difficulties such as these, however, in regard to the method of sending notice may be corrected easily by amendment.

(*Continued on page* 814)

13. Laws of 1931, Ch. 49, Art. IV, §16.
Penna. Laws of 1927, §1029; Penna. Stat. Supp. (1928) §963(a),
14. New Hampshire Laws 1931, Ch. 84 amending §17 Ch. 102 of the Public Laws. Georgia, Extra. Session 1931, Pt. I, Title III, No. 12, §24(c). Connecticut, Gen. Stats. Rev. of 1930, p. 558, §1605. Indiana, Ann. Stat. (Burns Supp. 1929) §10142 (amending §10142, Acts of 1929, p. 618). Maryland, Ann. Code of Public Gen. Laws, §151, 1916 Ch. 687; 1918 Ch. 85, §151. Art. 56, §196. New York, Vehicle and Traffic Law (1929) §75. [Laws of 1924, Ch. 360 added §290-a Highway Law.] California, Deering Gen. Laws, 1923, Act. 5128, §142, amended by Laws of 1927, Gen. Laws 1925-1927, Act 5128, §142.
Massachusetts, Gen. Laws of 1921 Ch. 90, §26.
15. Laws of New Jersey, 1908, p. 613.
16. *Kane v. New Jersey*, (1916) 242 U. S. 160.
17. Gen. Laws (1921) Ch. 90, §3, as amended by Stats. 1923, Ch. 431, §2.

18. *Hess v. Pawloski*, (1927) 274 U. S. 352.
19. Scott, *Jurisdiction Over Nonresident Motorists*, (1926) 39 Harv. L. Rev. 563; Hinton, *Substituted Service on Non-Residents*, (1925) 20 Ill. L. Rev. 1; Barry, *Jurisdiction Over Nonresidents*, (1927) 13 Va. L. Rev. 175, 184-186; (1925) 25 Col. L. Rev. 204, 207-208; (1924) 38 Harv. L. Rev. 111; (1927) 41 Harv. L. Rev. 94; (1925) 9 Minn. L. Rev. 362, 367-368; (1927) 4 Wis. L. Rev. 189, 307; (1925) 34 Yale L.J. 415, 425-426; (1925) 73 U. Pa. L. Rev. 171.
20. Laws of Del. 1927, Ch. 225; Laws of La. 1928, No. 86; Laws of Md. 1931, Ch. 498; Mass. Gen. Laws, *supra*, note 17; N. H. Pub. Acts, 1925, Ch. 106; Laws of N. J., 1927, c. 232; N. Y. Vehicle and Traffic Law (McKinney, Supp. 1931), §52; Laws of North Carolina, 1929, Ch. 75, §1; Session Laws of Okla. 1931, Ch. 50, Art. 13; Laws of Pa. 1929, No. 563; Acts and Resolves of R. I. 1928, c. 1143; Acts of S. C., 1931, Ch. 252; Laws of Texas, 1929, Ch. 125.
21. Providing for registered letter containing notice; but no provision for return receip:: Conn. Gen. Stat. (1930 Rev.) §5473; Ill. Stat. Ann. (Callaghan Supp. 1929) Ch. 98-a, §21; Pub. Acts of Michigan, 1929, p. 195, No. 80.
Providing for notice by mail, no registration or return receipt required: Laws of Minn., 1927, Ch. 409; Laws of Wis., 1925, Ch. 94 (Wis. Stat [1929] §85.05).
22. Laws of 1924, Ch. 232, §1, p. 517. Georgia, Extra. Session, 1931, Pt. I, Title III, No. 12, §30, provides for an appointment of an attorney-in-fact, and there is no provision for notice. This is the original form of statute upheld in *Kane v. New Jersey, supra*, note 16. This new statute applies only to motor carriers.
23. (1927) 276 U. S. 13.
24. Upheld in: *State v. Belden* (1927), 193 Wis. 145; *Schilling v. Odelbak*, (1929 Minn.) 224 N. W. 694; *Jones v. Paxton* (1928) 27 Fed. (2nd) 364 (Distr. D. Minn.).
Declared invalid in: Grote v. Rogers, (1930, Md.) 149 Atl. 547; Friedman v. Poirier, (1929) 236 N. Y. Supp. 96. See discussion of these cases in (1929) 39 Yale L. J. 126.

PROGRESS REPORT ON STUDY OF THE FEDERAL COURTS—NO. 7*

Report Is Most Important Official Recognition of the Necessity of Statistical Study of Proceedings of Trial Courts Which Has Yet Appeared in This Country—Emphasis Shifted from Formation of Principles to Examination of What Actually Happens in Lawsuits—Possibilities of Study Illustrated by Tentative Conclusions Drawn from Statistics of District of Connecticut

By Thurman W. Arnold
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WHILE the idea of a statistical study of the proceedings of trial courts is not entirely new, it may be said that this report is the most important official recognition of the necessity of that kind of research which has yet appeared in this country. The center of more conventional types of legal study has been the logic of the appellate courts. One might easily get the impression from such studies that the trial court is a sort of clerical assistant to the Court of Appeal, devoted entirely to the task of following its instructions, and kept within the path of its duties by constant reminders and corrections from its superior. Research in the law from this point of view assumes that the formulated principles are the important things, and that the trial court has no problems of its own other than to interpret these principles in a manner which will be approved on appeal. Law in books has been studied and analyzed; law in action has been left to guesses and personal experience. The result has been a very one-sided view of our legal institutions in which appellate courts, though actually handling a very small percentage of litigation, have so obscured our understanding of trial courts that they have almost been ignored. It is almost as if the directors of a corporation spent their entire time in drafting constitutions and by-laws without ever visiting the factory where business was carried on.

In this study the Commission has shifted its emphasis from formation of principles to examination of that which happens in law suits. The conclusions, therefore, are tentative. The main body of the document consists of tables of statistics. It attempts a picture of the practical operation of courts today together with a formulation of methods by which that picture can be kept up to date. It must therefore be judged on the basis of its promise rather than its accomplishment.

The methods used in the study were in a process of experimental development at Yale University when President Hoover first considered the scope of the Commission's activities. Dean Charles E. Clark had undertaken a study of State Courts in Connecticut, Ohio, and West Virginia. A project following these lines was suggested to the President by Mr. Clark and Robert M. Hutchins, President of the University of Chicago, then Dean at Yale. It was this suggestion that the Commission later decided to adopt. A committee was appointed, with Dean Clark as chairman, composed of William O. Douglas of Yale, Secretary, Justice Owen J. Roberts of the Supreme Court, President Robert M. Hutchins of the University of Chicago, Orrin J. McMurray, Dean of the Law School of the University of California, Professor E. M. Morgan of Harvard Law School, Thurman W. Arnold, then Dean of West Virginia Law School, Henry M. Bates, Dean of the Law School of the University of Michigan, and Harold R. Medina of Columbia Law School. The methods of the Yale State study were adopted as a basis for examining the Federal courts.

A unique feature of the study was that it enlisted the active assistance of representatives of twelve widely separated law schools, who supervised the gathering of statistics in their own districts. In addition to the law school members of the committee, whose names appear above, acknowledgement should be made of the loyal assistance of the following: Dean Harry A. Bigelow and Professor E. W. Putkammer of the University of Chicago, Professor Thomas E. Atkinson of the University of Kansas, Dean Rufus Harris of Tulane University, Dean Charles McCormick of the University of North Carolina, Dean Herschel Arant and Professor Silas Harris of Ohio State University and Professor J. B. Fordham, of the University of West Virginia. Like members of the committee, these men served without compensation. Working under them was a force totaling forty persons.

The object of the study is to obtain mass statistics which picture the actual activities of the court. Examiners are sent to files of the cases on record in the Clerk's office. The information is collected on printed forms and sent to a central office at the Institute of Human Relations of Yale University. There it is transferred to cards which can be counted and tabulated rapidly by the Hollerith Punch Card System. By means of this system any single type of information on the cards can be automatically correlated with any other type or with a number of other types. Once the cards are punched there is almost no limit to the tables of statistical correlations which can be prepared.

The data relating to each case is permanently kept on a separate card containing the names of the judge, the attorneys, the litigants, and the docket number of the case. Means are thereby available for future workers who desire to make qualitative

*Issued by the National Commission on Law Observance and Enforcement.

rather than quantitative studies by which they can go back of the collection information to the court record for a complete history of any case or series of similar cases.

There are three advantages peculiar to this method of collecting statistical information: (1) It permits the publication of general tables of statistical correlations from which conclusions may be drawn. (2) It furnishes investigators with the opportunity of getting any further tables which they deem pertinent. (3) It serves as an index or digest of the unreported proceedings of the trial courts from which an investigator can go to the records themselves.

It is thus obvious that the utility of this study goes beyond the temporary conclusions which are found in the report. The aim is to set up an available body of information concerning the actual operation of trial courts, indexed and classified for future use. In doing so, valuable experience may be gained indicating what type of information may profitably be gathered and what methods are most efficient in gathering it. The difficulties here are generally under-estimated by those who undertake to obtain statistical information.

The range of choice of the items to be included on the form is without limit. There are no such things as objective facts, which like atoms combine to make the total process of the trial. If the picture of the case is to be truly objective and unbiased, it can only be obtained by constant trial and error. Herein, we suspect, lies the defect of other sets of figures on court administration. The most available data are often collected and published for the sole reason that they are available. Such data become the statistical constants, which are incapable of variation because the machinery for collecting them is not sufficiently selective. They are seldom useful because there is not sufficient detail to uncover the dissimilar situations which lie behind their unwieldy totals. Even the much admired English figures have been criticized by Professor Sunderland[1] as follows:

"As a matter of fact the English have never gotten to the point of really giving much concrete information about the particular kind of litigation which is going on in the English courts. They limit their figures quite largely to unclassified, quantitative data, most of which is of very little value."

This criticism applies to most mass statistics. If information is to be helpful in solving future problems it must be capable of very detailed classification, and there must be a method of changing the classifications by going back, if necessary, to the original data. The system outlined in the report is the only one which is sufficiently elastic to permit the information to be be used in different combinations, and with general or detailed classifications as the nature of the specific problem studied may require.

The project undertaken by the Commission includes both civil and criminal cases taken from Districts in California, Colorado, Connecticut, Illinois, Kansas Louisiana, Massachusetts, Michigan, New York, North Carolina, Ohio, and West Virginia. The criminal study covers three years. The civil study includes the last fiscal year in most districts, and a longer period in a few. This information is not yet complete enough on the civil side to put the forms to the tests of application to any particular problem. Therefore the report discusses only the content of the civil form and the methodology adopted.

A glance at the civil form used in the Appendix of the Report will show its general intent. It is too detailed to be included here. It attempts to classify the type of case, its origin, the basis of jurisdiction, the various methods of termination, the form of relief, both final and intermediate, up to the results of the appeal, if any. A table of the pleadings is added for the purpose of the study of this much discussed problem. Particular attention is given to information concerning the time element in the trial of lawsuits. It is thus possible to follow the cases from beginning to end, to determine at what stage most of the litigation is disposed of, what statutes or common law rules impose the greatest burden on the court, the effect of reference to masters and referees in relieving the court of its burdens, the weight given to their conclusions in the main run of cases, etc. There are few legal devices which are not at least touched. The brief description of facts makes possible the study of what social problems give rise to the most litigation.

A detailed discussion of the reasons for including all the different classifications on the form would extend beyond the limits of this review. It can better be criticized by the person who approaches it with some definite question in mind. It is difficult, however, to believe that much of the information set out will not have some relevancy for some one who wishes information on the workings of the Federal Court.

At the time the Report was published, information on the civil cases had been completed in none of the districts studied, so that even a tentative illustration of what could be done with these figures was impossible. The criminal data had, however, been completed for the District of Connecticut. The Committee therefore felt that it might be of interest to illustrate the possibilities of this study by formulating whatever tentative conclusions might be drawn from the statistics of this district. Generalizations on only one district without comparison with others are of course inconclusive. They do, however, raise interesting queries for future examination. They serve to outline the problem. We therefore quote the guarded generalizations found in the introduction to the tables.

"I. THE DISTRICT COURT

The analysis of the criminal cases in the Federal District Court for Connecticut support the following tentative conclusions respecting the summary nature of the entire criminal proceedings.

"1. There is a complete absence of procedural delays and difficulties which commonly are thought to be inherent in and peculiar to the system.

"2. Contested cases and jury trials are negligible.

"3. The role of the court in general is the imposition of small sentences for minor offenses.

"4. Fines are scarcely ever beyond the ability of the defendant to pay.

"5. The process of choosing cases for prosecution is so selective that the time required for disposition is negligible.

"For example, in a total of 740 cases for the three year period: Only 9 jury trials, 8 being tried in less than one day; only 46 motions to quash and to suppress evidence in the same period; a majority of the cases finished the day the indictment or information was filed and 85 per cent. in less than 2 months; guilty pleas in 91.6 per cent. of the cases; only 5 acquittals and

1. Defects in English and American Statistics, Edson R. Sunderland (1930) 16 Am. Bar. Assn. Jour. 773.

53 dismissals in 3 years; fines rather than imprisonment in a majority of all cases and in 80 per cent. in the prohibition cases; amounts of the fine so nicely adjusted that in three years only 5 defendants were committed to jail for failure to pay; only 2 appeals.

"II. THE UNITED STATES COMMISSIONER

"The study of the United States commissioners from whom came 73 per cent. of the cases entering the district court, and the records of the district court, contain evidence of the following:

"1. There is a succession of uncontested cases, perfunctorily, mechanically, and expeditiously handled, nearly all of which are bound over.

"2. There is almost an entire absence of technical objection in the district court to arrest or to violation of constitutional rights in the execution of search warrants.

"3. There is evidence of a large uncontrolled discretion, exercised off the record, either by the commissioner or the Federal Enforcement agencies, by which possible contested cases are eliminated or prosecuted under less serious charges.

"4. The discretion in selecting cases appears to be chiefly exercised by Federal Enforcement agencies who prosecute the great majority of cases.

"5. The character of the cases disposed of, the lack of problems involving legal skill or technical knowledge indicate that in the majority of cases in Connecticut the intervention of the district court after the commissioner's judgment adds little to the efficiency of the process.

"For example: 75 per cent. of the district court cases coming from the commissioner show voluntary appearance without arrest; a majority show ultimate pleas of guilty; most of the cases are disposed of on the same day they were brought; 94 per cent. of the prohibition cases and 67 per cent. of the others are disposed of in less than one month; an unusually small percentage of commitments to jail; only 21 out of 276 cases officially dismissed for want of probable cause; a complete absence of objections to warrants or search warrants made later in the district court and no objections in the district court for violation of constitutional rights.

"On the other hand, over half of the recorded cases in the commissioner's office in 1929-30 consisted of warrants and search warrants which were never heard of again, given generally at the instance of the various Federal enforcement agencies, most of them returned unexecuted, and almost all of them occurring in prohibition cases.

"III. PROHIBITION CASES

"The selective process and summary disposition found in prohibition cases has resulted in a domination by them of the whole character of the Federal criminal proceedings as shown by mass statistics.

"For example: Prohibition cases have increased from 69 per cent. of the total of all cases in the first year of the study to 81 per cent. in the last; the total increase in the number of crimes has been taken up by prohibition cases, the other offenses remaining practically stationary; they furnish the great majority of fines as opposed to imprisonment; also a majority of the cases are disposed of the same day that the indictment or information is filed; almost 90 per cent. of the proceedings are by information in prohibition cases as opposed to 8 per cent. for all other cases; the great majority of prohibition cases are charged under the minor category of possession; the confinement of all prohibition offenders actually imprisoned is in local jails contrasted with the commitment of over half of other offenders in Federal penitentiaries."

This picture which the Connecticut Study gives of its criminal procedure is rather surprising. Current literature and thought would lead us to expect that the serious obstacles to criminal law enforcement consisted of technicalities, delays and continuances, irrational juries, a cumbersome grand jury system, long trials, appeals on obsolete doctrinal points, and in general the widely advertised results of what is generally called "the sporting theory of justice." The picture drawn by these figures fails to reveal the presence of any of these difficulties which are usually assumed without argument. On the contrary, doubts arise, not because the system is inefficient, but because it seems almost too efficient; because it presents the spectacle of a long line of orderly defenders, few of whom it is necessary to commit to jail, either before or after trial, pleading guilty with systematic regularity because reasonably accurate estimates of the sentence seem possible; raising no technical objections, and so far as the records show, complaining about no invasions of their constitutional or other privileges. The proceedings are so expeditious, untechnical, and uncontested that it becomes important to find where the selective process which produces such results can be concealed.

Further conclusions based on this Report must be frankly in the realm of speculation. Yet this review is written for the purpose of enlisting more general interest in the possibilities behind this report, and general interest lies only in possible conclusions. Methodology is left to the specialist. As the editors of this journal said in an editorial entitled Murmurs of Revolt:[2]

"Everybody favors statistics in principle. But there seems an incipient feeling in some quarters that they should not ride everybody too hard; above all they should not keep the public too long in suspense but should emit at the earliest possible moment at least a few fragmentary oracles."

We will here attempt by way of illustration a few such oracles.

Suppose for example our preconceived notions that the real difficulty with Criminal administration is in technical procedure should lead us to center our corrective effort on pleading and practice. If so, then at least in Connecticut Federal Courts, we would be spending our efforts on a disappearing problem. There were only nine jury cases tried in Connecticut Federal Courts in three years; eight disposed of in less than one day, with practically none of the expected delays in Court administration.

Many efforts at reform without statistical background result in that kind of thing. A moment's consideration will reveal how natural that is. When a lawyer rises to that stage where his opinions are listened to, his trial experience is far behind him. Yet he usually assumes that the things that were true of the Courts twenty years ago, before he became a public advisor, are still true. He is apt to resent the statements of some younger man, obscurely struggling with a changed situation, that times have changed. And the younger man, if he is wise, will be too busy trying cases to figure out what is wrong with a process which is profitable at least to him. Thus just as the conservatives are twenty years behind the times, so often are the liberals. They may be unknowingly fighting the battles of yesterday. There is no better corrective of such mis-spent efforts than the daily examination of Courts such as the Wickersham Commission has started here.

The Report starts another interesting line of speculation on the much decried bargain element of criminal administration. Though it offers opportunities for corruption, it is doubtful whether any method exists which could succeed in tying the hands of a corrupt prosecuting attorney. In a time when intelligent thought everywhere is crying for individualization of punishment, may not the bargain element offer one of the only methods of realizing this? A woman in Connecticut severely burned her child's hands for stealing a dime. Her mental age was seven. By means of an understanding with the prosecuting attorney and the welfare worker she was induced to plead guilty, without

2. 16 A. B. A. J. 727 (Nov. 1930).

raising the issue of insanity. This was the quickest practical way of putting her, not in jail, but in an institution. Other bargains may represent the efforts of an honest, hard pressed, prosecuting attorney to meet a difficult situation created by unenforceable laws. If in spite of all our requirements that the duty of the prosecutor is simply to prosecute, and the duty of the court to sentence, regardless of other factors in the situation, we find that the bargain element still continues to play a predominating part in the cases, there appears the possibility that there is something inevitable in this method of individualization of offenses under our present system. Such a tentative explanation would at least prevent us from starting on a crusade in which the bargain element is assumed to be capable of legislative abolition without changing anything else. Perhaps the only difficulty with this method of disposing of cases is that it is executed sub rosa where the merits of the prosecutor's action cannot be examined.

It may be that a more extended study might have some effect on the prevailing creed that law enforcement is an end in itself regardless of its effect on the community. No prosecuting officer can ever attempt to enforce all the laws at once, and there is no section of this country where it is done. Yet the conception that such is his duty permits any reform organization to throw the office of even an honest prosecutor into confusion if he happens to be concentrating on some other problem of public order, or if he happens to regard his task as one of a general officer in a war against crime in which a continuous attack on all fronts is poor military tactics. How far does the bargain element relieve him of impossible responsibilities in such cases? The existence of bargains, in the face of a creed condemning them may show that the prosecutor is inefficient, or coupled with other studies they may show that such bargains are inevitable.

The answer of the English prosecutor to such a demand for the enforcement of a particular law is easier. He may say that it is not his duty to enforce all laws in order that all laws may be enforced. He is engaged in trying to solve the problem of public order. If his inquisitor desires action which for tactical reasons does not fit in with his plan, the method of private prosecution is open. The prosecutor is thus permitted to concentrate upon the real problem of public order without appearing to deny the academic creed of the reformer that all laws of whatever nature should be equally enforced. An interesting query might be: Is there actually less bargaining in this country than in England in the matter of the trial and treatment of offenders? If there is not, may there not be better ways of treating the question created by this confused situation than by the easy way of denouncing bargains?

The writer has no fixed opinions to offer on these queries. They are not here presented as statements of fact, but for the sole purpose of illustrating the kind of investigations which a statistical study may help. The process is that the statistics can suggest possibilities, and the possibilities require further investigations. Problems of public order change with astonishing rapidity — much faster than observers burdened with old creeds realize. Without access to a statistical picture of what is going on in the daily routine of the courts, how can we distinguish the real from the imaginary problems?

An attempt to answer such a question is behind this Progress Report by the Wickersham Commission. Their idea in spending such a large proportion of their funds on it, and in recommending its continuance appears to be that accurate methods of obtaining information are as important in the future conduct of courts as are conclusions on the mistakes of the past. It is probable that from this Report may arise a technique for keeping the permanent statistics of the future.

So important did the Commission consider the work that they recommended its continuance under private auspices, and with private funds. Acting on the petition of Chairman Wickersham the Rockefeller Foundation has made a grant of $25,000.00 to the American Law Institute on condition that it shall assume the responsibility for the direction of the work, such appropriation to be available if before December 31, 1932 a like sum of $25,000.00 is secured from other sources. The additional sum required has not yet been secured. For this reason the study is temporarily at a standstill except for the preparation of further reports on the data already available. It is hoped, however, that funds for the continuation of the study may be obtained shortly.

Death of Judge Stephen H. Allen

JUDGE STEPHEN HALEY ALLEN, former Justice of the Supreme Court of Kansas, former President of the Kansas State Bar Association, leading lawyer and author of note, died suddenly at his home in Topeka, Kan., on October 26. Short eulogies were delivered at the funeral service, which was held in his home, by Hon. William A. Johnston, the venerable Chief Justice of the Supreme Court, and by Hon. Frank Doster, former Chief Justice, both of whom had served with Judge Allen on the Supreme Court.

Judge Allen studied law in his brother's office in Buffalo, N. Y., and was admitted to the Bar there in 1869. Going west, he served for a while as assistant chief engineer on a railroad project. Later, he began the practice of law and held various public positions: County attorney of Linn Co., Kan.; district judge in Linn, Bourbank and Crawford counties; and Justice of the State Supreme Court. He had been a member of the Commissioners on Uniform State Laws, representing Kansas, since 1909 and served on many important committees of that body.

He was president of the Kansas State Bar Association in 1898. He was chairman of the committee of the bar association which wrote the Revised Code of Civil Procedure for Kansas in 1909.

In 1916 he published his work on "Evolution of Governments and Laws," a work which has received a wide circulation among students of government. In 1920 he published his "Creed of Universal Law," a thoughtful discourse on law, spiritual and human. Besides the works mentioned he had published in pamphlets and newspapers and periodicals many articles on the matter of government and laws.

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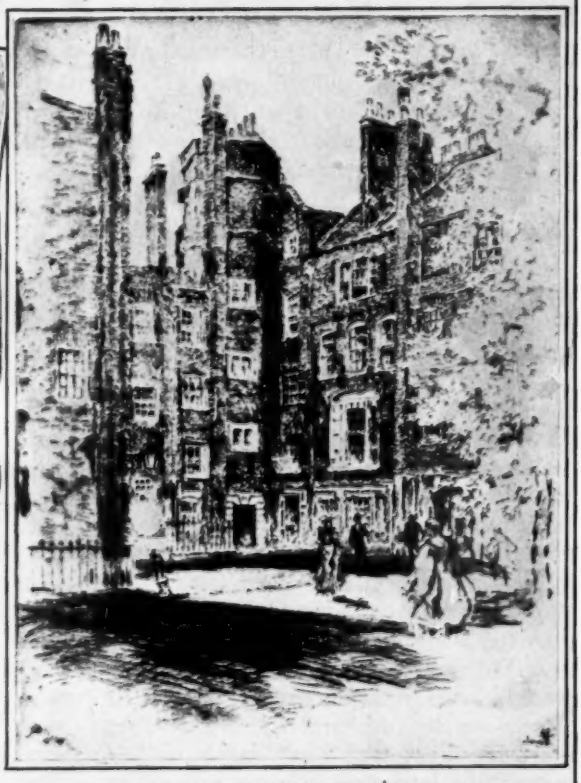

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CASTING UP THE ACCOUNT

The end of the year is at hand—a time for a retrospective glance—for a casting up of accounts spiritual as well as material. As one looks over the record of the American Bar Association and the State Bar Associations for this period one is impressed by the fact that it has been a year of real achievement. Moreover, the great intangibles have come through the period of stress and strain in the business world without impairment. There has been no letting down in morale, no hint of a compromise of ideals.

In the large account of a nation or a profession, or any group whatever, this item of the ideal that guides it remains the supremely important thing. In the case of the profession of the law, one can see its unimpaired vitality manifesting itself during the past year, in the activities not only of the national but also the state and local Bar Associations. The pages of the Journal furnish at least an inadequate record of this and one would look in vain for any indication of doubt or discouragement. All the plans initiated to improve the administration of justice and to make the legal profession equal to its great responsibility have been carried a step further towards realization.

To mention only a few details, Professional Ethics is receiving more attention than ever before, and during the past year there has been a further emphasis on the responsibility of the lawyer in public office. The standard of legal education has been held high in 1931 and a step has been taken, in the form of an organization of Bar Examiners, which promises to raise a further barrier against the admission of the incompetent and the unfit. The movement for a more effective discipline of the Bar has unquestionably scored a distinct advance. New Judicial Councils have been created with their promise of expert study and practical recommendations for improving the machinery of justice. The courts have made slow but real advances in the improvement of their methods of procedure, on their own initiative. The challenge against legislative invasion of the judicial province is growing firmer and more general. The Bar's cooperation in movements to clarify the law has been increasingly evident during the past year. At no time have the ardors and abilities of the profession responded more readily to the call for unselfish service.

With such a spirit in existence the future could not fail to be bright. There is every reason to anticipate that 1932 will furnish its full measure of satisfactions to those who are devoted to the ideals of the Association. In fact, the work has already begun. The committees have already been appointed, and under the active, enthusiastic and capable leadership of our new President, real results are certain to be achieved.

THE BAR EXAMINERS ORGANIZE

The Conference of Bar Examiners, which held its first meeting and perfected its organization at Atlantic City, is the latest addition to the list of auxiliary bodies closely connected with the work of the American Bar Association. Certainly this new organization can show a valid reason for existence. The Bar Examiners occupy a strategic point in the route that leads to admission to the Bar, and although they do not control the volume of admissions, the methods which they employ in discharging their special functions have a good deal to do with the character and qualifications of the new recruits.

Such an organization comes as a natural response to the development of a better technique of examination and a clearer understanding of the important part which the Examiners play in the whole process of admission. As long as a bar examination was a more or less perfunctory affair, which neither the applicants nor the examiners took any too seriously, there

naturally was no incentive for men to get together from all parts of the country and discuss such unimportant matters. But all that is long past and the function of the Examiner is better understood today. It is seen to be something of an art and to involve problems of method which were never dreamed of in the past. It is also seen to have a very important bearing on the larger problem of the character which the profession itself is to maintain in the years to come. There is surely enough in all this to stir the interest and to make an exchange of views, of the results of experiments, highly desirable.

A LESSON IN POISE

In his address at the unveiling of the bust of the late Chief Justice Taney at Frederick, Maryland, Chief Justice Hughes not only paid a tribute to his great predecessor but also discharged a duty on behalf of the profession to which he belongs. For it is the duty of that profession to keep green the memory of those who have ornamented it by character and career; and this is particularly true where the subject has been the victim of popular misconception.

Second in interest only to the great judicial service which Chief Justice Taney rendered the nation—which is strikingly summed up in the address—is the remarkable example of judicial poise which he exhibited during his long tenure of office. He seems to have realized the poet's estimate of one whom "custom could not make dull nor passion wild." As Chief Justice Hughes puts it, "For over twenty-eight years—a time of bitterest controversy ripening in tragical conflict—he presided over the Supreme Court, maintaining in the face of rancorous criticism, and amid the excesses of passion, a serenity and dignity, as well as a conscientious devotion to his task, which won the highest praise from the ablest and most discriminating of his associates whose appreciation of talent and character was not impaired by either political or judicial disagreement." Again: "He bore his wounds with the fortitude of an invincible spirit."

In the great tradition of the law there is room for much more than mere legal ability. The independence of Erskine, for instance, comes down with an importance almost equal to his great ability as an advocate—probably as an essential part of that ability. The personal character of John Marshall is mixed in that tradition with his monumental service in behalf of a united nation. Similarly, the great example of judicial poise, of calmness in the face of criticism and opprobrium, which was set by Chief Justice Taney is no insignificant part of his greatness.

The public will, in all likelihood, never come to understand and appreciate this phase of his character and career—particularly in days like these when calmness and poise and heroic self-restraint can hardly be classed among the objects of popular admiration. But the profession itself can do so and can profit by a great example.

MORE ANTAGONIST PRINCIPLES

In the Oct. issue we mentioned certain principles that are today in conflict in the legal field and which lend interest to the legal scene, but we by no means exhausted the list. Definite, constructive programs of progress as against a laissez-faire attitude —here are two more well-defined antagonist principles, more general in form but clearly defined and always in evidence. Theirs is a struggle within the Bar itself. We would hardly think of "laissez-faire" as a principle had not certain economists of other years elevated it to that dignity in their especial field. But we find it very active in the legal field today, whenever any improvement in substantive law or procedure is proposed, and it carries with it the familiar philosophy of justification. "The old-time legal religion is good enough for me" is its favorite hymn. "Lincoln wasn't particularly well-educated, so why should anyone else think it necessary to the proper practice of law?" "We have gotten on pretty well with the traditional, dogmatic theories of law, so why worry about gathering labored statistics as to how law actually works, as a basis for further changes?" These are a few of the most familiar echoes of the laissez-faire spirit in its crudest manifestations. Other out-croppings are more subtle and more highly evolved, but the essence of the spirit is there. It reigned supreme for many years in Bar Associations, on the bench, even in many law schools. Today it is definitely in retreat. No one can read the reports of the activities of the various Bar Associations in the Journal without realizing that its adherents are a dwindling minority.

REVIEW OF RECENT SUPREME COURT DECISIONS

Tennessee Statute Levying Tax on Motor Buses in Interstate Transportation, Based on Seating Capacity, Held Invalid—California Statute Imposing Tax on Gross Receipts of Motor Vehicle Transportation Companies Upheld as Involving Reasonable Classification—Minnesota Motor Vehicle Registration Tax Case—Trend of Decisions Adverse to Extension of Rule Exempting Instrumentalities of State and Nation from Each Other's Taxing Power Illustrated in Several Cases—Federal Income Tax Case Involving Constitutionality of Refusal to Permit Deduction of Interest on Indebtedness Incurred to Purchase Tax-Exempt Securities of States in Computing Net Income—Other Income Tax Cases—Points of Interest Regarding Validity of Provisions of Revenue Act of 1918 Imposing Tax on Transfer of Estates in Contemplation of Death, etc.

By Edgar Bronson Tolman*

THIS review of decisions is designed to cover briefly certain Taxation and Revenue cases decided during the last term of the Court, not heretofore reviewed. The number of such cases prevents their review separately in the usual manner, and they will be dealt with by classes and in briefer compass.

Motor Vehicle Tax Cases

A Tennessee statute levying a tax on motor busses engaged in interstate commerce was held invalid in *Interstate Transit Co. v. Lindsey*, Adv. Op. 559; Sup. Ct. Rep., Vol. 51, p. 380. Differences in the amount of the tax on the vehicles were dependent entirely upon their seating capacity. In analysis of the statute the Court found that the tax failed to come within the class of enactments valid as the fair contribution which may be required of users of highways towards the cost of constructing and maintaining them and regulating traffic.

> As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, as in *Clark v. Poor*, 274 U. S. 554, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. . . But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity.

A detailed examination of the statute demonstrated that the tax was not imposed as compensation for the use of the highways, but for the privilege of doing interstate business. In this connection it was emphasized that the taxes levied go, not to any highway fund, but "to the General Funds of the State."

The opinion dealt also with a contention that a tax graduated according to carrying capacity is a reasonable measure of compensation for use of the highways. It was pointed out in answer to this, that, although such a measure may be proper in respect of busses doing intrastate business where the privilege may be taxed without regard to compensation for highway use, such a measure is too remotely related to use to be applied to interstate commerce.

> In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage traveled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except insofar as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses.

In *Alward v. Johnson* (Adv. Op. 354; Sup. Ct. Rep., Vol. 51, p. 273), challenge was made to a California statute imposing a tax on the gross receipts of motor vehicle transportation companies, 4½% in the case of busses and 5% in the case of trucks. This tax was in lieu of all other taxes on the franchises, cars, trucks, equipment and other property of the company, and was construed by the state courts as a property tax. The objection made generally to the tax was that it was confiscatory, for failure to take into consideration the actual value of the property, and arbitrary in that the tax rate on an ad valorem basis did not exceed 3%, while the tax as measured here amounted to $1,057.16 on property valued at $15,000 (i. e., roughly about 7%).

The classification for tax purposes was upheld as reasonable and within the power of the State.

> The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough. Here the tax laid was exclusive of all other taxation and the funds arising therefrom were assigned to the maintenance of roads, essential to petitioner's operations.
>
> Certainly, petitioner is in no position to complain of an arbitrary exactment. The prescribed method of assessment was permissible and the mere fact that he was required to pay a higher rate upon property devoted to his peculiar business than was demanded of property not so employed is unimportant.

A further point in the case arose from the fact that a very large fraction of the taxpayer's receipts were payments made by the government for carrying United States mail. It was argued that such receipts

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were not subject to the tax. This contention was rejected, however, because the tax was not on the contract of carriage and affected the operations of the government only remotely.

> The facts in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, and *New Jersey Bell Tel. Co. v. State Board*, 280 U. S. 338, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here.

The validity of a motor vehicle registration tax, imposed by a Minnesota statute, was challenged in *Storaasli v. Minnesota* (Adv. Op. 465; Sup. Ct. Rep., Vol. 51, p. 354), as applied to vehicles registered under federal authority on the Fort Snelling Reservation. The appellant was a member of the United States military forces stationed at Fort Snelling and urged that the tax was an invalid exaction as applied to him, first because property located on the military reservation is not subject to taxation by a state; and second, because the tax discriminated against him in violation of the equal protection clause of the Fourteenth Amendment.

The first objection was disposed of upon the ground that the tax was in fact a privilege tax for the use of highways, rather than an imposition on property.

The second point urged was predicated upon the effect of a provision of the State Constitution to the effect that a member of the military forces shall not be deemed a resident of the state in consequence of being stationed there, together with a provision giving exemption from the tax to non-residents whose vehicles are registered in another state. This, it was argued, imposed a heavier burden on the appellant than on other non-residents. The further point was made that the statute discriminated in favor of residents by exempting their licensed vehicles from property taxes.

Both of these contentions were determined adversely to the appellant. The discrimination in favor of residents was thought proper and lawful, despite the appellant's inability to come within it.

> Doubtless in the case of every taxing act which creates exemptions there are those who cannot bring themselves within the exempt class, but this does not deprive them of the equal protection of the law.

The exemption of non-residents' cars which are registered in other states was likewise held not to be unlawfully discriminatory as against a non-resident stationed on the Reservation.

> But as was pointed out in *Kane v. New Jersey*, 242 U. S. 160, the absence of any such provision in favor of non-residents, would not render the law discriminatory. A resident of the state who desires to operate his car for a single day is liable for the entire year's tax. If the state determines to extend a privilege to non-residents, it may with propriety limit the concession to those who have duly registered their vehicles in another state or country. The mere fact that appellant has not so registered his car and cannot, therefore, bring himself within the class benefited by the exemption, does not create a discrimination against him. The state was not bound to make a classification with respect to exemptions for him and those similarly situated.

Tax Exemption of State and Federal Instrumentalities

The trend of decisions adverse to extension of the rule of exempting the instrumentalities of the state and the nation from each other's taxing power, showing a reluctance to go further in the direction to which *Long v. Rockwood*, 277 U. S. 142 and *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, point, is illustrated in two cases, under the title of *Susquehanna Power Company v. State Tax Commission of Maryland* (Adv. Op. 513, 517; Sup. Ct. Rep., Vol. 51, pp. 434, 436), and in *Group No. 1 Oil Corporation v. Bass* (Adv. Op. 487; Sup. Ct. Rep., Vol. 51, p. 432).

The *Susquehanna Power Company cases* involved an attack on the validity of a tax assessed by Maryland on submerged lands of The Susquehanna Power Company, located in Maryland, and on the capital stock of that company. Its dam was constructed across the Susquehanna River, assumed to be navigable, under a license from the Federal Power Commission. The principal objections raised to the assessment of the submerged land were, first, that the construction and operation of the power plant, under federal license, made it and its lands and property agencies or instrumentalities of the federal government, by implication not subject to taxation by the state; and second, that in assessing the lands, the tax commission assigned to them a value attributable to the federal license, and to river waters, not property of the company, in violation of the due process clause of the Fourteenth Amendment.

In regard to the company's first contention the Court ruled that, assuming the license to be a federal instrumentality, immune from state taxation, it did not follow that the property used in the power project was clothed with the same immunity.

> . . . the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage.

Though the Supreme Court divided sharply in the decision of *Long v. Rockwood*, 277 U. S. 142, there was no dissent from the opinion that the principle applied there was not controlling here. Distinguishing that case, the Court said:

> . . . It was there held that royalties derived from a patent granted upon an invention by the federal government could not be taxed by a state. But there would be no warrant for extending such immunity to property of the patentee used to manufacture the patented article, and only a comparable extension would justify the immunity claimed here for appellant's lands because used as a part of its licensed project.

The Court also rejected the company's contention that the tax was invalid because the assessment of the lands at a valuation higher than surrounding lands involved a forbidden tax on the license, and a tax for the value of the waters of a navigable stream.

> Accepting, as we must on this record, the valuation of the Commission as neither excessive nor discriminatory, we can perceive no basis, either legal or economic, for relieving appellant from the burden of the tax by attempting the segregation of a part of that value and attributing it to independent legal interests, not subject to taxation, because those interests have a favorable influence on the value of the property. . .
>
> A large part of the value of property in civilized communities has been built up by its inter-related uses; that it is a value ultimately reflected in earning capacity and the price at which the property may be sold, and hence is an element to which weight may appropriately be given in determining its taxable value. It has never been thought that the taxation of such property at its enhanced value is in effect taxation of its owner for the property of others. Nor can we say that the present tax, based upon what must be taken to be the fair value of appellant's lands profitably used in the business of developing and selling power, is forbidden because that use would not have been possible without the control which appellant has acquired over navigable waters through the grant of its license. Those considerations which lead to the recognition of the power of a state to tax the property used by the grantee in the enjoy-

ment of a federal license require recognition of the power to tax it on the basis of accepted standards of value, customarily applied in the taxation of other forms of property.

The second of the *Susquehanna Power cases* (Adv. Op. 517; Sup. Ct. Rep., Vol. 51, p. 436), involved an objection to a capital stock tax on the ground that, and as assessed, it included a value attributable to the federal license. The grounds for rejecting this contention were thought sufficiently stated in the land tax case to require no further discussion. The opinion dealt chiefly with a contention that since the entire capital stock was owned by a non-resident of Maryland it had a taxable situs only at the owner's residence, and to the charge also that the tax was arbitrary and excessive. The tax was upheld against these contentions, however, upon the ground that, since the statute provided for deduction of the value of the real estate in determining the taxable value of the stock, and the assessment did not exceed the value of the tangible personal property, and was in lieu of any property tax on the latter, it was valid as an indirect tax on tangible personal property.

The limitation on the rule rendering instrumentalities of the state government immune from federal taxation is illustrated by the *Group No. 1 Oil Corporation* case. There the State of Texas had granted and leased to a corporation the right of drilling and operating for petroleum and gas. The lessee was required by the lease to pay to the State the value of a stated fraction of the oil and gas taken. The lands in which the rights were granted had been set apart under mandate of the Texas Constitution for the benefit of the state university, and the corporation contended that income derived from the sale of the oil and gas taken under the lease was not subject to federal tax, upon the theory that such a tax would be an imposition on an instrumentality of the State. The Court, in disposing of the case, pointed out that the lease had been construed by the state courts as in fact a sale of the oil and gas. It was conceded that a sale of property by a government to raise revenue for governmental purposes is a government instrumentality, and that a federal income tax on the proceeds of sale by one who has purchased from the state government has a remote and indirect effect on the price that government will receive. This, however, was deemed too remote to exempt the proceeds of sale by the corporation from federal taxation.

> This Court has consistently held that where property or any interest in it has completely passed from the government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once government owned, or because the sale of it effected some government purpose. . .
>
> Property which has thus passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens. Denial to either government of the power to tax it, or income derived from it, in order to insure some remote and indirect antecedent benefit to the other, would be an encroachment on the sovereign power to tax, not justified by the implied constitutional restriction.

Cases involving proceeds from the sale of Indian lands and interest, therein, immune from state taxes, were distinguished. It was pointed out that none of them extended the immunity to property, or to income derived from the sale of property, where it had passed to the buyer by a completely executed sale, without restriction and without retention of any interest therein for the benefit of the Indians.

Federal Income Tax Cases

Among cases arising under the federal income tax laws and recently decided is that of *Denman v. Slayton* (Adv. Op. 356; Sup. Ct. Rep., Vol. 51. p. 269), involving the constitutional validity of a provision not permitting the deduction of interest on indebtedness incurred to purchase tax exempt securities of the states in computing net income, while permitting the deduction of interest paid on other indebtedness. The respondent was engaged in the business of purchasing, carrying and selling tax exempt municpal bonds. He collected interest from them, and paid interest on money borrowed for purchasing and carrying the tax exempt bonds. In his tax return he excluded interest received from the bonds and deducted the interest he had paid out on the borrowed money. The statute, Sec. 213 (b) (4), of the Revenue Act of 1921, excludes interest received on state and municipal obligations from gross income, and in Sec. 214 (a) (2), it allows deduction of interest paid on indebtedness, except that incurred or continued to purchase or carry obligations whose interest is tax exempt.

The taxpayer challenged the validity of the exception referred to in the latter section as discriminatory against the owners of non-taxable securities and as nullifying their immunity from taxation. It was also contended that the statute was arbitrarily discriminatory in allowing interest paid as a deduction for operating expenses in other businesses but denying it here, and also arbitrary in its operation against the respondent, whose resources did not permit him to purchase tax free securities for cash, and in favor of those whose resources enabled them to deal in such securities without borrowing.

These contentions were rejected, and the exception challenged was sustained as a valid provision to prevent the escape from taxation of income, properly taxable, by the purchase of tax exempt securities with borrowed money. The practical operation of the theory contended for by the respondent was illustrated to show the propriety of the statutory exception.

> Under the theory of the respondent, "A," with an income of $10,000 arising from non-exempt securities by the simple expedient of purchasing exempt ones with borrowed funds and paying $10,000 interest thereon, would escape all taxation upon receipts from both sources. It was proper to make provision to prevent such a possibility. The classification complained of is not arbitrary, makes no improper discrimination, does not result in defeating any guaranteed exemption, and was within the power of Congress. The fact that respondent engaged in the business of buying and selling is not important.

In *Burnet v. Whitehouse* (Adv. Op. 529; Sup. Ct. Rep., Vol. 51, p. 374), the Court dealt with the application of Sec. 213 (b) (3) of the Revenue Act of 1921 providing that gross income shall not include the value of property "acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income). . . ."

The question raised here was whether payments made by executors under a will in satisfaction of an annuity should be included in the annuitant's gross income, when they were in fact paid from income from the testator's estate, though the will empowered the executors to apply any part of the personal property of the estate in payment of the annuities. The Commissioner, relying on *Irwin v. Gavit*, 268 U. S. 161,

demanded income tax on the payments made out of the income from the estate, but the Court ruled against his contention, pointing out that the income was a sum certain, to be paid irrespective of income to the estate.

> As held below, the bequest to Mrs. Whitehouse was not one to be paid from income but of a sum certain, payable at all events during each year so long as she should live. It would be an anomaly to tax the receipts for one year and exempt them for another simply because executors paid the first from income received and the second out of the corpus. The will directed payment without reference to the existence or absence of income.
>
> *Irwin v. Gavit* is not applicable. The bequest of Gavit was to be paid out of income from a definite fund. If that yielded nothing, he got nothing. This Court concluded that the gift was of money to be derived from income and to be paid and received as income by the donee. Here the gift did not depend upon income but was a charge upon the whole estate during the life of the legatee to be satisfied like any ordinary bequest.

The necessity of complying with the statutory requirements in proving losses on the sale of property was emphasized in *Burnet v. Houston* (Adv. Op. 551; Sup. Ct. Rep., Vol. 51, p. 413). There the taxpayer in 1906 had subscribed $305,000 to a fund to guarantee a value to certain collateral deposited by Adolph Segal, who was indebted to the Real Estate Trust Company of Philadelphia. Under a plan the subscribers were to share profits, if any, after reorganization of the company holding the collateral. After various transactions the collateral was converted into stock of the Pennsylvania Sugar Company, and in 1920 part of the stock was distributed to subscribers in proportion to the amounts of their subscriptions. The taxpayer here received 222 shares having a market value of $150 each. On that basis he wrote off a loss of $271,700 in 1920 computed by deducting the value of the stock, $33,300, from the amount of his original subscription.

The statute (Revenue Act of 1918, Sec. 202 (a) required that in computing losses on the disposition of property acquired prior to March 1, 1913, the basis shall be the fair market price or value on that date. But the respondent failed to show the value on that date, and showed only the cost of his interest in the collateral in 1906 and its value in 1920.

The Court held that this was a failure to comply with the statute, not to be indulged, as held by the Court below, upon the ground that it was impossible to show the value in 1913.

> We cannot agree that the impossibility of establishing a specific fact, made essential by the statute as a prerequisite to the allowance of a loss, justifies a decision for the taxpayer based upon a consideration only of the remaining factors which the statute contemplates. The definite requirement of §202 (a) (1) of the act is not thus easily to be put aside. The impossibility of proving a material fact upon which the right of relief depends, simply leaves the claimant upon whom the burden rests with an unenforcible claim, a misfortune to be borne by him, as it must be borne in other cases, as the result of a failure of proof. . . .
>
> Neither can the presumption be indulged that the *cost* of respondent's interest in 1906 was the *value* of that interest in 1913, for *non constat* that such cost was the value even in 1906.

A question as to what constitutes a loss which may be deducted from gross income, under the Revenue Act of 1924, arose in *Eckert v. Burnet* (Adv. Op. 573; Sup. Ct. Rep., Vol. 51, p. 373). There two partners incorporated their business and became endorsers on notes of the corporation. When the notes came due the corporation was unable to pay them, and the individuals, former partners, gave their own notes in exchange for the corporation's notes which they had endorsed. The tax return covering the transaction was on the cash basis, and one-half of the amount of the later notes was deducted by one of the partners as a loss "ascertained to be worthless and charged off within the taxable year." The Court held that such a deduction was not allowable as a loss for the year 1925, since the return was on a cash basis and the note was not paid in fact during that year.

> For the purpose of a return upon a cash basis there was no loss in 1925. As happily stated by the Board of Tax Appeals the petitioner "merely exchanged his note under which he was primarily liable for the corporation's notes under which he was secondarily liable, without any outlay of cash or property having a cash value." A deduction may be permissible in the taxable year in which the petitioner pays cash. The petitioner says that it was definitely ascertained in 1925 that the petitioner would sustain the losses in question. So it was, if the petitioner ultimately pays his note. So was the tax considered in *United States v. Mitchell*, 271 U. S. 9, 12, but it could not be deducted until it was paid.

Federal Estate Tax Cases

Two points of interest regarding the validity of certain provisions of the Revenue Act of 1918 imposing taxes on the transfers of estates by decedents were considered in *Milliken v. United States* (Adv. Op. 435; Sup. Ct. Rep., Vol. 51, p. 324). The first related to the validity of the provision taxing gifts made in contemplation of death, a question which previously had not been passed upon directly. It was held, however, as the Court had intimated previously, that the inclusion of such gifts in the decedent's gross estate is a permissible classification to secure equality of taxation and to prevent tax evasion.

The second question arose as to the validity of a provision imposing a higher rate by a later statute upon a gift after it has been executed. The transfers involved had been made while the Revenue Act of 1916 was in effect, but the donor's death occurred while the Act of 1918 was operative, imposing higher rates of tax. The objection to the tax was, not merely that it was retroactive, but that it measured the tax by rates not in force when the gift was made, applied to the value of the property not when given, but at the uncertain later time of the death of the donor.

The Court distinguished *Nichols v. Coolidge*, 274 U. S. 531, *Untermyer v. Anderson*, 276 U. S. 440, and *Coolidge v. Long*, 282 U. S.—pointing out that they may be sustained upon the ground that the nature and amount of the tax burden could not have been understood or foreseen at the time of the particular voluntary act which was made the occasion of the tax. The Court observed that a tax is not necessarily arbitrary and invalid because retroactive, and concluded that here it was fair, since the gift when made was subject to tax under the Act of 1916, and the donor was warned and took his chances that the rate might be increased.

> The reasonableness of the present application of the increased rate of tax of the 1918 Act must be determined in the light of the legislative policy which the 1916 Act had established before the gift was made. Obviously that policy would be set at naught if gifts made in contemplation of death, after the 1916 Act, were to be taxed more favorably than transfers from the donor occurring at and by reason of his death. As was apparent when the 1916 Act was adopted, that policy could be made effective only if gifts made in contemplation of death, while that Act was in force, were to be subject at the donor's death to such rate as might at the time of that event be applicable to the transfer of the donor's estate. The decedent, when he made his gift,

was as well warned that it might be taxed on that basis as he was that it would be so taxed if on that day he had made the same disposition of it by will. A change in the rate applicable to transfers at death necessitates a corresponding change in the rate applicable to gifts made in contemplation of death, else the purpose in taxing the latter would not be attained. That purpose, as already indicated, was to put such gifts on the same plane as testamentary disposals.

Klein v. United States (Adv. Op. 527; Sup. Ct. Rep., Vol. 51, p. 398), presented the question whether a particular conveyance by deed was intended to take effect in possession or enjoyment at or after the grantor's death, within the meaning of the provision requiring such transfers to be included in the grantor's gross estate for taxation. The habendum clauses in the deed described an estate in the grantor's wife for her natural life and provided that if she died before the grantor she should have no interest greater than a life estate, and that in that event the reversion should remain vested in the grantor. It was provided, however, that if the grantee survived the grantor she was to have the property in fee simple.

The Court concluded that the property conveyed must be included in the grantor's gross estate, and cited *Milliken v. United States,* supra, to dispose of an objection to the validity of the tax because retroactive.

> It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. * * *
>
> The provision of the Revenue Act of 1918, so far as it seeks to tax the transfer in question, is assailed as unconstitutional because, it is said, the transfer was complete and irrevocable before the act was passed. In support of this view *Nichols v. Coolidge,* 274 U. S. 531, and similar decisions of this court are cited. But the deed under review, while made before the enactment of the Revenue Act of 1918, was made after the Act of 1916, c. 463, 39 Stat. 756, 777, which, with an addition not pertinent here contained (§202) exactly the same provision; and the contention, for that reason, other grounds aside, is without merit. *Milliken et al. v. United States.*

The proper construction of the phrase "in contemplation of death," as used in the statute to bring within the taxing provisions certain transfers of property made in a decedent's life time, was discussed in *United States v. Wells* (Adv. Op. 592; Sup. Ct. Rep., Vol. 51, p. 446). It appeared there that the testator since 1901 had made advancements of money and property to his children from time to time, to determine their capacity to manage it, as a guide to him in disposing of his property by will. Transfers in substantial amounts were made in January, 1921, about eight months prior to the testator's death, to equalize advancements to each of his children. These transfers, together with transfers of stock in 1919 and transfers of property in trust in January, 1921, constituted the items disputed in the case.

The testator's death resulted from ulceration of the bowel, or, in the language of the death certificate "suppurative colitis." The death certificate stated that the duration of the disease was one year. At the time of the transfers the testator had been treated for ulcerative colitis, and had been pronounced "90% normal," and had been given to understand that he would entirely recover. He also suffered from asthma.

The decedent left, exclusive of the disputed transfers, property valued at $881,314.61, yielding an annual income of about $50,000.

On the facts shown, which are summarized above, the Court concluded that the transfers were not in contemplation of death, under the statute. Turning to the interpretation to be placed upon that phrase, the Court said:

> While the interpretation of the phrase has not been uniform, there has been agreement upon certain fundamental considerations. It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive. The provision is not confined to gifts *causa mortis,* which are made in anticipation of impending death, are revocable, and are defeated if the donor survives the apprehended peril. * * * The statutory description embraces gifts *inter vivos,* despite the fact that they are fully executed, are irrevocable and indefeasible. The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. * * *
>
> As the transfer may otherwise have all the indicia of a valid gift *inter vivos,* the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or non-existence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death. The natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death is recognized by the statutory provision creating a presumption in the case of gifts within two years prior to death. But this presumption, by the statute before us, is expressly stated to be a rebuttable one, and the mere fact that death even shortly after the gift does not determine absolutely that it is in contemplation of death. The question, necessarily, is as to the state of mind of the donor. . .
>
> It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in "contemplation of death," as there can be none in relation to fraud, undue influence, due process of law, or other familiar legal concepts which are applicable to many varying circumstances. There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus to give effect to the manifest purpose of the statute.
>
> We think that the Government is right in its criticism of the narrowness of the rule laid down by the Court of Claims, in requiring that there be a condition "creating a reasonable fear that death is near at hand," and that "*such* reasonable fear or apprehension" must be "the only cause of the transfer." It is sufficient if contemplation of death be the inducing cause of the transfer whether or not death is believed to be near.

Cleveland Bar Creates "Institute"

WITH the object of keeping the membership abreast of the developments in law, the Cleveland Bar Association has authorized the creation of a new section to be known as the Institute. It is planned to bring to Cleveland leaders and specialists in various branches, each to deliver a series of three addresses on the particular subject assigned to him. Discussion will follow the talks. The proposal to establish the Institute was made by Mr. H. E. Varga, second Vice-President of the Association. He suggested the organization of what he termed a law college of post-graduate work for members, consisting of ten sections, each dealing with several branches of the law.

THE ABDICATION BY THE STATES OF POWERS UNDER THE CONSTITUTION

Extent to Which People of the Country Are Forcing on the Federal Government Responsibilities and Activities Which Founders Never Contemplated as Part of Its Functions—Absence of Method for Properly Presenting for Judicial Decision the Constitutional Validity of Appropriation and Expenditure of Public Funds Under General Welfare Clause—Matters Once Dealt with by States and Communities Now Put Up to Government—Increasing Demand That It Take Lion's Share in Dealing with Organized Crime, etc.*

By Hon. William D. Mitchell
Attorney General of the United States

CONSTITUTION WEEK has been established to make Americans pause for a time and direct their attention to our constitutional system, for a fuller understanding of and a higher patriotic devotion to its principles. In this, the last of a series of radio addresses on the Constitution, during Constitution Week and under the direction of the American Bar Association, I shall deal with two aspects of our constitutional practices which relate closely to very live questions of public interest.

No one who has spent a few years in the service of the Federal Government at Washington observing its operations, can fail to be impressed by the extent to which the people of this country are forcing onto the Federal Government responsibilities and activities which its founders never contemplated should be dealt with by the central government. In our early history the battle was between those who believed in a strong central government and those who carried the states' rights doctrine to the extreme. The contest for a strong central government is over. Since the Civil War there has been no doubt that the Federal Government wields adequate power for its own preservation and for the efficient discharge of its constitutional functions. We used to speak of encroachment by the Federal Government on the powers of the states, in the sense of a grasping of power by the Federal Government from resisting state and local governments. There has now developed a definite tendency toward willing abdication by the states of some of their proper functions. There is still resistance to transferring to the Federal Government powers which the states desire to keep, but what I have in mind is the definite disposition of local governments, induced by the desire to avoid uncomfortable tasks, to shift to the Federal Government duties and responsibilities which are burdensome, expensive, or distasteful. Recently this tendency has been most pronounced in two ways; first, in the extent to which the Federal Government is being asked to step out of its proper sphere by drafts on the public treasury and the expenditure of national funds under that provision of the Federal Constitution known as the general welfare clause; second, in the disposition to demand of the Federal Government that it use its very limited powers in respect of the detection and prosecution of crime, to undertake a disproportionate share of the task of suppressing crime.

1. The Federal Government is one of limited powers. It has only those powers defined in the Constitution or which are reasonably necessary or proper for their execution. The tenth amendment expressly provides: "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Yet we find a clause in the Constitution which, in its practical application, seems to have opened the door wide for the Federal Government to engage in many activities which have no reference whatever to the powers of the Federal Government as enumerated elsewhere in the Constitution. That clause, known as the general welfare clause, is found in Section 8 of Article I of the Constitution, the pertinent provisions of which are as follows:

> "The Congress shall have power to lay and collect taxes, . . . to . . . provide for . . . the general welfare of the United States."

It authorizes Congress to raise money and spend it for activities promoting the general welfare. The question at once arises as to what is meant by the general welfare. In spending money for the general welfare may Congress go beyond the powers of the Federal Government enumerated elsewhere in the Constitution, or must Congress confine itself to those fields of action within the powers enumerated in the Constitution? That question has often been debated but has never been determined by the court of last resort, and for peculiar reasons is not likely to be. Other questions relating to the constitutional powers of the Federal Government touch individuals in such a way that the persons affected have an interest enabling them to invoke the judgment of the courts, but with respect to the appropriation and expenditure of public funds under the general welfare clause, no one has yet been able to devise a method by which the constitutional validity of such measures may properly be presented for judicial decision.

A recent instance is found in the cases of the State of Massachusetts against Mellon and Froth-

*Address broadcast from Boston Sept. 19, under auspices of the American Bar Association and as part of the celebration of Constitution Week, by the National Broadcasting Company.

ingham against Mellon, decided by the Supreme Court of the United States in 1922. Congress passed a statute in 1921 called the Maternity Act, authorizing the expenditure of moneys from the Federal Treasury to reduce maternal and infant mortality. Among the powers listed elsewhere in the Constitution there is nothing that would remotely authorize the Federal Government to deal with that problem, outside of those areas like the District of Columbia, where it exercises exclusive sovereignty. Suits were brought by the State of Massachusetts and by Frothingham, a taxpayer, against Andrew W. Mellon as Secretary of the Treasury to enjoin the expenditure of funds on the ground that protection and care of mothers and their infants is a local matter within the powers reserved to the states and not within the limited and defined authority of the Federal Government. The Supreme Court held that the State of Massachusetts had no right to raise the question because as a state it was not affected and had no such interest as entitled it to maintain the suit. The taxpayer was likewise defeated on the ground that the contributions to the Federal Treasury of any taxpayer are relatively too minute to give him any substantial interest. No other method of bringing the question before the courts has been devised. The result is that the choice of purposes for which the Federal Government may levy taxes and expend money under the general welfare clause rests with the Congress and back of it on public opinion.

So it is that under these conditions it is becoming more and more our practice to make drafts on the Federal Treasury under this power, to carry out some purpose not within the enumerated powers of the Federal Government. Matters that once were dealt with by individual initiative, by community co-operation, by voluntary organization, by local governments or by states, are in this way being shifted to the Federal Government. There is a temptation to get all we can out of the Federal Treasury for causes in which we are interested, because somehow we feel that there is an inexhaustible supply of money there, most of which has been contributed by others. One evil result is extravagance not only by Federal but by state and local governments. Federal aid for local projects, when required to be matched by local appropriations, has a tendency to induce excessive expenditures by state and municipal governments, with top-heavy bond issues and oppressive local taxation. We have now reached a point where, under the stress of business depression and unemployment, preparations are being made in some quarters to demand of Congress direct contributions out of the Federal Treasury for relief of distress and thus force the Federal Government into what has been known abroad as the dole system. Want and misery resulting from unemployment must be prevented. All are agreed about that. Men differ as to the source from which relief is to come. There are those who believe it is not a matter for appropriation from any public treasury, local, state, or national, of moneys raised by taxation and that the natural talent of the American people for voluntary co-operation and organization should be resorted to. Others believe that, while public funds raised by taxation may be resorted to, the matter should be dealt with as a local problem and municipal and state funds should be appropriated. Others still, following the modern tendency to run to the national treasury at Washington for money, are insisting on appropriations by Congress for direct relief of the unemployed. If the last course is followed, resort to the general welfare clause of the Constitution will have reached its peak, and the Federal Government will have embarked on a course of action the consequences of which may be far-reaching. As a matter of national policy, is relief of distress from periodic unemployment to be furnished out of the national treasury or is the problem to be dealt with by improvement and readjustment of our industrial system and the creation of reserves or unemployment insurance by industry itself through co-operation of capital and labor, brought about or supervised, if necessary, by legislation? The bitter lesson of the dole in Great Britain should furnish the answer to that question.

Because, as I have pointed out, the constitutional limits of the so-called general welfare clause may not readily be made a judicial question, the legislative and executive branches of the Federal Government, on which rests the real responsibility for keeping within those limits, have reason for care to refrain from taking a step which may have grave consequences.

This tendency, under the authority of the general welfare clause, to plunge the Federal Government into action unrelated to its defined powers is one which many of us are not inclined to oppose but which public opinion should be educated to resist. It is not merely a legal technicality as to the constitutional powers of federal or state governments. It goes to the very spirit of our constitutional system, the maintenance of the proper balance between local and national governments and the preservation of that system of local self-government and responsibility under which we have heretofore prospered. A departure from the right course will result in placing upon the Federal Government tasks which never can be as economically, as carefully, or as intelligently done at long range and through vast bureaus as through local communities and local governments.

II. We come now to the second point, which is the increasing demand on the Federal Government to take the lion's share of the responsibility for dealing with organized crime. Here we find another example of the growing disregard of the principle that, under the Constitution, the National Government is one of limited powers. It is one which an attorney general of the United States has special reason to notice. The Federal Government is limited by the Constitution to punishing those crimes which impair Federal powers and interfere with the functions of the Federal Government. All other crimes should be dealt with by state and local authorities, and yet daily we see this constitutional principle ignored. We have in many of our large cities organized gangs of criminals who engage in every conceivable crime against the laws of God and man. Their offenses against the Federal Government are relatively few compared with those against state laws. Murder, extortion, kidnapping, banditry, blackmail, gambling rackets, levy of tribute on business by threats of violence, and frauds, unless committed in those limited areas in

which the Federal Government has exclusive sovereignty, such as the District of Columbia, are not directly violations of any Federal law. There are as many different kinds of "rackets" worked by organized bands of criminals as there are varieties of pickles. Is the extermination of these criminal gangs to be chiefly the task of the Federal Government because they do not pay Federal income taxes on their illicit gains or because incidentally they violate some Federal statute?

Concrete examples will serve better than generalities to show that under the Constitution the main duty and power to suppress organized crime, so prevalent in our metropolitan districts, belong to local governments. In some cities we find criminal extortion by gangsters, who force merchants having loads of perishable food stuffs in cars in the railway yards awaiting unloading to pay tribute to avoid interference by gansters and loss of the perishable commodities through delay. The criminal codes of all states make such action punishable under state law, but these cars may have passed in their movements from one state to another and thus have entered interstate commerce. The Federal Government has power under the Constitution to regulate interstate commerce and therefore to protect it and to punish offenses against it. Because of this Federal power and notwithstanding the state in which the offense is committed has adequate power to punish it, appeal is made to the Federal Government at Washington, if the state authorities are indifferent, inefficient, or corrupt, and fail to protect the merchants and punish the criminals.

A similar situation exists in connection with stolen articles moving in interstate commerce. We now have an act of Congress passed under the commerce clause of the Federal Constitution making it a crime to transport a stolen motor car from one state to another. One who steals a car or who knowingly possesses a stolen car commits a crime against the state law where the theft or possession occurs. Yet, because the commerce power of the Federal Government is involved, state authorities are inclined to leave to the Federal Government the task of punishing the thief. At the last session of Congress a serious effort was made to carry this system farther by passage of a law making it a crime against the Federal Government to transport from one state to another stolen merchandise worth as little as one hundred dollars, thus burdening the already overloaded prosecuting agencies of the Federal Government with the duty of detecting and punishing every petty thief or possessor of stolen merchandise who moves it across state lines.

In the building trades, rackets are organized for extortion by limiting contracting and building to local concerns, who either join the ring or are forced to pay tribute extorted by the racketeers. Incidentally, such crimes may have the effect of preventing the shipment of building materials into the state by outside contractors excluded from the ring. Thus interstate commerce is affected, and in some instances the anti-trust laws are incidentally involved. The Department of Justice at Washington is frequently importuned to punish such racketeers for the violation of the anti-trust laws or other acts relating to commerce, when the direct and real responsibility rests with states or cities, whose officers for one reason or another fail in their duty. Whatever the criminal gangs may be doing, whether through gambling rackets, extortion, illicit dealing in drugs, murder, or what not, the Federal Government is expected to punish them for failing to pay Federal income taxes on their illicit gains, when the state authorities should be bringing them to book for the much more serious crimes they commit against state laws.

In many places are concerns engaged in selling securities which are worthless or the value of which they misrepresent. These acts are crimes against the laws of the states where they occur. The states have power through supervision by securities commissions to prevent such operations. They have power to punish them, yet because such offenders often send letters through the United States mails in furtherance of their schemes to defraud, the Federal Government, having power to protect the mails against such uses, is often expected to take the principal burden of bringing them to justice.

For prohibition enforcement, we are disposed to look chiefly to the Federal Government, although the state and national governments have concurrent powers under the Eighteenth Amendment, and it was the obvious intention, when the amendment was adopted, that each state would do a large part of the enforcement work within its borders.

Recently, organized gangsters in the City of New York, attempting to kill a rival, shot down little children in the streets. Instantly clamorous demands were made on the Federal officials and on the President to bestir themselves. The murder of children in the City of New York is not a Federal crime and may not constitutionally be made such. It was stated in the press that this particular gang was engaged in illicit traffic in narcotic drugs. What has the Federal Government to do with the drug traffic? It has power to prohibit the importation of drugs or the transportation of drugs in interstate commerce or to tax drugs, but not to prevent dealing in drugs within a state. There is an Act of Congress, known as the Harrison Anti-Narcotic Statute, but that is a taxing statute. It requires packages of narcotic drugs to bear tax stamps and punishes those who sell or possess drugs on which the stamp tax has not been paid. To go even that far in dealing with the drug traffic, the constitutional powers of the Federal Government were stretched to the limit. The validity of the Harrison Anti-Narcotic Statute, as within the power of the Federal Government, was originally sustained by a bare majority of the Supreme Court of the United States. Surely, it is not the primary duty of the Federal Government to punish this murderous gang merely because they may have been dealing in drugs on which Federal stamp taxes have not been paid. Any public agitation against organized crime tending to arouse public opinion and compel action by responsible authorities is commendable, but it should be pointed in the right direction. To look to the Federal Government as primarily responsible in such matters is to disregard not only the spirit but the letter of the Constitution, to shirk local responsibility, and to overlook the direct primary duty of the states and municipalities.

The truth is that such organized criminal gangs must be dealt with by local authority. Municipal authorities have thousands of police, where the

Federal Government has one. Local police and city officials have a fund of knowledge about the operations and affiliations of criminal gangs in their communities which Federal agents sent into the field, could not acquire in years. If local police do not perform their duty, it is because local officials do not want them to, and if municipal officials are lax, it is because the people of the community are content to let things be as they are. Passing new laws, state or Federal, will not solve the crime problem. There are already laws enough. The need is for officials who will enforce them and for public opinion in every locality to demand enforcement. Our trouble is that our ideas of personal liberty have been stretched to such a point that we chafe under and feel free to disregard laws which we think unduly interfere with our individual affairs.

Through a disposition to do their utmost, all departments of the Federal Government, by invoking Federal criminal statutes, recently have been active in aiding local authorities to deal with crime conditions, but the more the Federal Government does, the more seems to be demanded of it.

An index of the recent vigorous effort of the present Administration at Washington to perform its full share of the task of punishing crime is the fact that the number of persons under sentence of Federal courts for Federal offenses, either in prison or under probation or parole, rose from 24,000 on July 1, 1929, to 42,000 on July 1, 1931. We know that the tendency to let Uncle Sam do it arises in part from the belief that Federal agencies are more efficient and less amenable to those sinister influences slowing up the processes of criminal justice which prevail in our metropolitan districts, but the good people who feel that way about this matter are wrong in thinking that the Federal Government can properly perform these tasks, and in the campaign against organized crime, the tendency to focus attention on the Federal Government instead of on state and city governments is mistaken and ineffective. If we have organized gangs of criminals in our cities, the trouble is not in Washington. It is right there at home. The responsibility is there. The power to clean such rascals out, exists in our own communities and nowhere else, and if local officials have not the will to do it, the power to remove them is with the people of the community. There is no warrant in our Federal constitution for looking to the national government in Washington to perform the task. It is obvious that, although the Federal Government is required to protect its own functions against criminal activity and deal directly with crime, when it rears its head in the fields entrusted by the Federal Constitution solely to the Federal Government, the constitutional powers of the national government are limited and its methods must be roundabout and amount to little more than a sideswiping at crime when it comes to coping generally with the crime situation or even with those aspects of crime which both Federal and state governments have power to deal with.

This, again, is not merely a technical legal question as to the respective powers of State and Federal Governments. It goes deeper than that. What the people of any community want they can have. The solution of our crime problem under our constitutional system is one for cities, counties, and states. It must originate in an aroused public opinion, in a demand for obedience to and in respect for law, and in a lessening of that disposition of local governments and communities to abdicate in favor of the Federal Government responsibilities which the Constitution of the United States does not impose upon it.

Current Legislation—Continued

(*Continued from page 798*)

But a new obstacle of a different kind has been encountered. The statutes already discussed do not undertake to impose any compulsion upon the non-resident to accept the letter containing the notice, nor to sign a return receipt therefor. Consequently if he refuses to accept the letter the condition specified in the statute for completed service cannot be satisfied and jurisdiction is not acquired. Legislation probably directed toward overcoming this obstacle made its appearance in 1928 in Louisiana,[25] providing that in lieu of mailing the notice, it may be served upon the defendant personally. In the present year North Carolina[26] has made such a provision in more specific language:

"When the place of residence of the defendant or defendants in the action described in sections one and two of the act is made to appear by affidavit filed with the Commissioner of Revenue and the plaintiff files with the Commissioner at least five ($5.00) dollars to pay the costs of the service hereinafter provided for, then it shall be sufficient for the Commissioner of Revenue to mail a copy of the summons, together with a statement sufficient to show the nature of the action or proceedings, accompanied by his certificate that the summons and complaint had been served on him, to the sheriff or other process officer of the county and state where the defendant or defendants reside. This sheriff or other process officer, authorized to serve process in the state to which it is sent, shall serve the same according to its tenor. This sheriff or process officer, who serves the papers, shall, in making his return, use a form of certificate substantially as follows; and this form of certificate shall accompany the other papers in the case: . . ." [form]

Still another alternative form is furnished by Oklahoma:[27]

". . . or in lieu of mailing said copy by registered mail to the defendant, notice of such service may be had upon the defendant by delivering a copy of such process, with the return of the officer endorsed thereon, to the defendant, or to any member of defendant's family over the age of fifteen years, at the usual place of residence of the defendant in any state where the defendant may be found or in which such defendant may reside, by the sheriff, constable or any other peace officer in such state; such service of said notice to be made upon the defendant shall be made at least twenty days before the answer day provided for in such process, and the affidavit of the sheriff, constable or other peace officer giving such notice, setting forth the manner and date of same, shall be filed with the papers in said case."

New Mexico[28] has recently provided that the plaintiff in the action must deliver to the non-resident defendant personally without the state a copy of the process, complaint, order and notice of service on the Secretary of State.

The speed with which legislation of this general type is attempting to keep pace with the changing character of the problem is indicated by the fact that both of the statutes just quoted are themselves amendments to legislation enacted in 1929. Experimentation with the new devices will be watched with interest. Perhaps the statutes can be so framed as to make it practically certain that service can be completed if the non-resident can be found.

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25. Laws of 1928, No. 86. Similar provisions have been enacted in other states: Acts and Resolves of Mass., 1928, Ch. 344, §§ 1 and 2; N. Y. Vehicle and Traffic Law (McKinney, Supp. 1931) §52, added by Laws of 1930, Ch. 57. Michigan Pub. Acts, 1929, p. 195, No. 80, provides for personal service in lieu of registered mail (where no return receipt is required; Acts and Resolves of R. I. 1931, Ch. 1753.
26. Public Laws of 1931, Ch. 33.
27. Pub. Laws of 1931, Ch. 50, Art. 12, §10137-2.
28. Laws of 1931, Ch. 127, §2.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

Elementorum Jurisprudentiae Universalis Libri Duo. By Samuel Pufendorf. Vol. I. A Photographic Reproduction of the Edition of 1672, with an Introduction by Hans Wehberg, a list of Errata, and a portrait of Pufendorf (pp. 377 and xxvi). Vol. II. A Translation of the Text by William Abbott Oldfather, with a Translation (by Edwin H. Zeydel) of the Introduction by Hans Wehberg, and an Index (pp. 304 and xxxiii).

Quaestionum Juris Publici Libri Duo. By Cornelius van Bynkershoek. Vol. I. A Photographic Reproduction of the Edition of 1737, with a list of Errata, and a portrait of Bynkershoek (pp. 417 and viii): Vol. II. A Translation of the Text by Tenney Frank, with an Introduction by J. de Louter, and an Index (pp. 304 and xlvi).

(The Classics of International Law, edited by James Brown Scott. Publications of the Carnegie Foundation for International Peace. 1931. Oxford: At the Clarendon Press.)

. . .

Pufendorf's book is, as its title implies, primarily a book on Jurisprudence. Its method bears the marks of his early training in mathematics, and its subject matter of his early training in the doctrines of natural law. The arrangement of the work is mathematical in form. "He begins with twenty-one Definitiones, which form the contents of the first book, then in the second book he establishes two Axiomata, and concludes his work with five Observationes." This is a method which is not well suited to the study of jurisprudence, so that it is not surprising that it is not consistently pursued. But, after all, form and method are of small importance as compared with subject matter. The subject matter of the book is dominated by Pufendorf's conception of natural law—in his view a universal law which governs all the human race. The book is primarily a text book of the principles which the author conceived to be taught by this natural law. It was by reference to this law that the morality of the actions of men and of societies of men must be determined. The main principle of this law was that every man and every society ought to live in peaceable intercourse with all others. The natural law governing man is supplemented by the law of particular states. But the law which governs those societies of men which are independent nations is solely the law of nature.

In these two books Pufendorf considers different branches of law from this point of view. They are not concerned only or primarily with international law. With international law he deals more in detail in his greater work *De Jure Naturae et Gentium.* But most of the ideas upon international law, which he elaborated in his larger work, are to be found in the passages in this work in which he deals with international law. He follows out logically the idea that the international law which governs the relations between states is the law of nature, and the law of nature alone; and he "thus became the founder of the purely natural law conception of the law of nations." That was a conception which was better suited to an early stage in the evolution of international law than to a later—to a stage in which precedents were scanty and conflicting, and in which, therefore, there was the more need for insistence upon *a priori* principles. In fact his treatment of international law illustrates both the strength and weakness of this method of treatment. He emphasizes the fact that peace is the natural condition of human society. He condemns wars waged merely for the sake of war, for the sake of conquest, or for the maintenance of the balance of power. Before war is begun an attempt at amicable settlement must always be made. A state should, before beginning the war, consider its effect not only on itself but also on other states. In making these contentions Pufendorf was a pioneer. But he was unable to apply his theories of natural law consistently, because he felt himself obliged to make concessions to the facts of his day, which led him to adopt some very dubious theories. War was a fact; and Pufendorf reconciles this fact with his theory of natural law by asserting the legality of a just war, such as a war to ward off an unjust attack or to assert an undoubted right. But if the war was a just war, and thus allowed by natural law, any kind of force could be used by the belligerent. Customs mitigating cruelty had no force; for, as natural law only binds between nations, no regard can be paid to usage and custom. He even "goes so far as to assume that treaties concluded during the war, for example an armistice for the burial of the dead, need not be observed by the parties, since the natural law demands that the shortest course be pursued in order to force an opponent to peace. Only treaties aiming at the end of the war, i. e., at the conclusion of peace, must be observed according to natural law."

Those are the sort of difficulties into which those who deduce rules of conduct from *a priori* theories by merely logical processes usually fall. For the evolution of sane rules of law, contact with reality must needs control the processes of logic. At the same time it must be remembered that Pufendorf's position enabled him to make a critical estimate of existing rules of law—his theory of natural law was to him what the theory of utility was to Bentham; and, in the sphere of international law, it enabled him to emancipate its rules from the actual practices of the day, and to evolve rules which, if they sometimes sank below, were generally far in advance of that practice. Moreover, as Professor Wehberg has said in his Introduction, his vision of natural law as a means to a

great synthesis in which all kinds of law—public, private, and international—could be embraced and developed on harmonious lines, was one which was far beyond the ideas of his day. Under the influence of the discoveries of physical science, which are creating new links between the nations, the first steps in the direction of such a uniform and harmonious development of all these kinds of law are only just beginning to be taken by professors of comparative law.

. . .

Pufendorf was the university professor who studied law on theoretical lines: Bynkershoek was the practising lawyer and judge who learnt and applied his law at the bar and on the bench. Therefore, whilst Pufendorf based international law on the *a priori* basis of an abstract law of nature, Bynkershoek placed it on the positive and practical basis of ascertained usages, rules deducible from treaties, and legal principles. He conceived of it as a law which is derived, not so much from natural law, as from the implied consent of nations evidenced by usage, and from their express consent evidenced by treaties. The practice of nations is, so to speak, the raw material of international law, which the reason of the trained lawyer must digest into a system. He says, in chapter 18 of his book *De Foro Legatorum*, "Nulla ullorum hominum auctoritas ibi valet, si ratio repugnat. Non Grotius, non Puffendorfius, non interpretes, qui in utrumque commentati sunt, me convicerint, si non convicerit ratio, quae in jure gentium definiendo utramque paginam facit."

His *Quaestiones Juris Publici* were published in 1737—six years before his death. The first book treats of war: the second with many miscellaneous subjects, most of which are closely connected with questions relating to the public law of the Netherlands, and some of which contain important contributions to the rules of international law. Because his experience as a judge had led him to concentrate his attention on the practical questions which came before the courts, and because Holland was a maritime nation, he has much to say on such subjects as prize, contraband, and blockade. And the consideration of these subjects led him to pay far more attention than any previous writer to the question of the position of neutrals. Professor de Louter considers that his chapters on neutrality "form the crown of the whole work." It is true that he did not recognize neutrality as a separate and independent part of international law—this was hardly recognized till Hübner's work *De la Saisie des bâtiments neutres* in 1759. But he prepared the way for the construction of the rules of international law on this subject. Both in this book, and in his book *De Foro Legatorum*, he did much to settle many questions in the law relating to ambassadors.

In Professor de Louter's opinion Bynkershoek has, in these two books, "succeeded in comprehending the whole of international law of that time." But he does not distinguish clearly between international law and the public law of his own state. Concrete legal problems arising in both these branches of law are discussed by him in these two books; and they are discussed as a judge would discuss them if he were obliged to give a decision upon them. In fact, as Professor de Louter has pointed out, Bynkershoek was neither a moralist nor a philosopher, but a lawyer. "His juridical propensity strongly inclined to positive law, and his profound knowledge of Roman and Dutch civil law moved him to turn to these abundant sources of jurisprudence in order to fill up the alarming voids which the law of nations still presented. . . . Reason was his trustworthy guide, logical deduction his tried instrument." As a lawyer he is mainly interested in the problems which arose out of such matters as the capture and recapture of enemy or neutral property, out of contraband, or out of breach of blockade. "The intricate puzzle arising from such questions as these are analysed and solved with great sagacity and in truly judicial spirit."

This method of approach to the problems of international law is very much more akin to the juridical methods of English and American lawyers, than the more theoretical method of approach adopted by writters of the school of Pufendorf, because it is founded on the consideration of concrete cases. Partly for this reason, and partly because very many of the problems discussed by Bynkershoek are problems of those parts of international law which relate to maritime topics, his works have always enjoyed a great reputation in England and America. For this reason these two volumes will be especially welcome to English and American lawyers.

Like the other volumes in this series, the printing, the introductions, the editing, and translations are all that can be desired.

W. S. HOLDSWORTH.

All Souls College, Oxford.

The Sacco-Vanzetti Case. Transcript of the Record of the Trial of Nicola Sacco and Bartolomeo Vanzetti in the Courts of Massachusetts and Subsequent Proceedings, 1920-8. New York: Henry Holt & Company. 6 vols.

The Sacco-Vanzetti Case. By Osmond K. Fraenkel. (American Trials, Edited by Samuel Klaus). 1931. New York: Alfred A. Knopf. Pp. xv, 550, xv.

"The Sacco-Vanzetti Case" is the title to the third book of a series of "American Trials" published by Alfred A. Knopf. The book is edited by Osmund K. Frankel of the New York Bar. The asserted justification for its publication, as given by the publishers, is to provide a single volume account of this trial. In view of the recently published six volume complete record of the trial by Henry Holt & Company, it is not clear why a one volume narrative thereof should be attempted. The six volumes present a complete record of all the proceedings had on the trial, including the testimony, the numerous motions for new trials, the briefs in support thereof, the arguments upon appeal, the numerous opinions of the trial judge and of the Supreme Court, as well as an account of the proceedings before Governor Fuller, when he was considering the commutation of the sentence, and the hearing before and the report of the three Massachusetts citizens who were appointed by the Governor to report on the guilt of the accused and the fairness of the trial. This set of books may now be found in most well supplied public law libraries. Any individual who wishes "to ascertain whether 'justice was done'" in this case may study this record—read every word of the testimony, every ruling of the court, most of the arguments of counsel, as well as the facts set forth by way of affidavits, upon which the numerous motions to secure a new trial were based.

Was the trial judge prejudiced? And did he inflame the minds of the jurors when he instructed them, first, respecting their qualifications, and later, on the law of the case? The exact words and all of them are

printed in the Holt publication, and they furnish their own substantiation or refutation of the charge of prejudice.

Was Maderio's confession sufficient to arouse a conviction or suspicion of his guilty participation in the cold-blooded murder at South Braintree? His entire story, with all its contradictions, together with the disputing affidavits, as well as the comments of the court and the State Commission, may all be found in the said six volumes.

Why then, this new volume? If it were presented openly as a partizan effort based on the editor's belief in the innocence of the accused or the unfairness of the trial, it could be better appreciated. But the "foreword" refers to the Henry Holt & Company publication and says, "We have realized too how desirable it is that the public should have access to a single volume account of the case."

That the book is not a complete record of the trial but an effort to convince the reader of the unfairness of the court is apparent from a reading of the first chapter. This impression is given further support by a reading of the last chapter. The book is not a narrative of the proceedings had in the Sacco-Vanzetti case —not a bill of exceptions, containing in narrative form all the material facts brought out on the trial, but rather is an advocate's statement of the record which favorably presents the points upon which the accused relied for a reversal of the judgment. If the book is so read and understood, no criticism can be fairly made. If it is presented as a complete and a fair statement of all the facts, it is misleading. To cite a single illustration —In the writer's statement of facts on page 13, he says:

> " . . . Sacco when arrested had a .32 Colt pistol and thirty-two cartridges of various makes; Vanzetti, a .38 Harrington & Richardson revolver with no extra cartridges, but he had a number of shotgun shells in his possession. At the time of the trial Vanzetti said he had purchased his gun a few months earlier as a protection against hold-ups. Sacco had owned his pistol for several years."

The possession of shotgun shells in and of itself gave rise to no inference of criminality. The record showed however that the Buick car which carried the murderers to South Braintree had, sticking through the back window, a sawed-off shotgun. Vanzetti claimed that he had shotgun shells because occasionally he went out into the country for a stroll or a walk, and sometimes he shot birds. The shotgun shells found on his person were loaded with buckshot which is more commonly used by bandits in sawed-off shotguns than by pedestrians walking through the country and shooting birds. Likewise, no statement is made of the fact that the accused both denied having revolvers in their possession when arrested or that Vanzetti falsely stated the place and time when he secured his revolver. Nor at this place was it stated that the revolver found in Vanzetti's possession was of the same make and of the same calibre as the revolver that had been taken from the deceased guard by the murderer immediately after his killing.

For the most part the public has taken sides in this case without a reading of the record. The individual who has seen fit to study the entire record can rarely be found. It seems reasonable to expect that only the painstaking student will study the case in the future. If his approach is to be open minded, and his study complete, he will look to the six volume record.

EVAN A. EVANS

United States Circuit Court of Appeals, Chicago.

Corporation Accounting. By William T. Sunley and Paul W. Pinkerton. New York: Ronald Press. 1931. Pp. xvi, 570.—This treatise is exceptional among books with similar titles in that, with some few exceptions, it really confines itself to those phases of accounting which pertain to corporations. Much the greater part of the book discusses the accounting for capital; surplus, as used in corporation finance; the issue and retirement of bonds; various kinds of consolidation; and the reorganization of corporations. The discussion is remarkably clear and explicit. Transactions covering almost every situation likely to occur are explained and illustrated by journal entries or *pro forma* balance sheets. The authors are to be complimented on the fullness of the exposition and the manner in which it is carried out.

Question may be raised whether too much stress has been laid on what accountants have done, rather than on what they logically ought to do. Similarly various statutory regulations are treated as if they expressed the fundamentals of accounting theory. The sum legally available for dividends is by no means an index of how much profit a corporation is actually making. The rule that a mining company may distribute its net receipts from operation without regard to depletion is important; but not all the decisions from the *Lee case* down, nor all the statutes from Delaware to California, can make such net receipts the profits of the enterprise.

A demurrer is to be filed against the author's view that property acquired by the issue of shares is to be valued according to the previous book values of the purchaser's stock. Objection also lies against the view that when Corporation A (whose books show a surplus of fifty per cent.) issues $100,000 new stock in exchange for stock of Corporation B (which has a book value of par), the purchaser's books should show among the assets "Stock of Corporation B, $100,000" and also "Goodwill, $50,000." In reality the purchaser has not bought both stock and goodwill any more than it has bought both stock and real estate.

Whatever criticism may be made of particular details the treatise as a whole is highly meritorious. It is a pleasure to recommend it, especially to members of the legal profession, to so many of whom accounting is a hidden mystery expressed in an unknown tongue.

HENRY RAND HATFIELD.

University of California.

The Principles of Judicial Proof or the Process of Proof. By John Henry Wigmore. Boston: Little, Brown and Company. 1931. Pp. xix, 1056.—Looked at from the outside, this volume of more than a thousand pages, with its impressively formidable title, presents an appearance so forbidding as to daunt the ordinary reader and hold him back from engaging with it.

When the book is opened, its table of contents examined, its pages leafed rapidly through and it is found to be not a massive treatise dealing wholly with abstractions, but a new kind of combination text and case book, devoted to the practical problems of the preparation of facts for, and their presentation upon, trials in which the principles stated, the rules laid down, are supported not by mere references but by profuse quotations, and are illustrated and demonstated not only by reference to tests experimentally made, but by full reports of the facts of real cases,

this appearance of formidability disappears, and the book invites.

It is apparent, however, that this is not a book to be read through from cover to cover at a sitting, nor, in fact, to be read in that way at all. It is a book to be used both as a tool and a tool-sharpener, to sharpen the mind for its work, and to furnish it a tool to work with.

Treating of the processes of the mind, concerning itself with logic and psychology, it concerns itself with them as with things in action. It inquires and seeks to show how the minds of men work when they do the acts which trials deal with; how the minds of the first observers, the witnesses, those who saw the acts in the making, work, and how the minds of the second observers, the investigators, the third observers, the lawyers, and the fourth observers, the triers, work.

The book has, of course, its appeal to the psychologist, and the logician; to the general, the philosophic student of the law, its problems and its practices. It is designed, however, primarily to appeal, and its real appeal is, to the practical ones of us whose contact with the law is, or is to be, with it in the field—investigators, lawyers, judges. Such minds, devoted or to be devoted, when their studies are completed, to the elements and ways of proof in actual trials, will find the attentive study of the rules and formulas, the examples and charts by which they are adjusted and applied, the numerous citations, the concrete illustrations furnished by the almost numberless fact cases, an invaluable drill serving generally to order and regiment the mind in its approach to fact problems, and particularly as to any case in preparation, by suggestion and stimulation, to assist in bringing up for mental review all of the possible hypotheses, offensive and defensive, of which the case admits.

Its value then to the lawyer is two-fold—assisting him in bringing a case to the fullest preparation in advance of the trial, and teaching him to be alert and resourceful in the thick of it, to meet and overcome the difficulties, foreseen and unforeseen, which arise as the proofs come in.

More than any other law-book that I have read, this book deals with induction, the passage by the marshalling of facts from the particular to the general, the search for facts in particular cases for the purpose of generalizing toward proof.

It emphasizes over and over the importance in the study of the facts of a case, of maintaining that openness and wideness of view in pursuit of facts, which keeps the mind ever tirelessly searching for new choices, ever constantly ranging to find a fresh scent, instead of standing baying where the track was lost, and gives it that indefatigability in pursuit of facts which, preventing premature conclusions, is the prime characteristic of the inductive method.

Because it does this, the suggestions are more tentative than authoritative, supported more by reasoning than by precedent.

Herein lies the difference between this and other law books. The others are able to lay down rules and principles, and cite precedents which sustain them, by which the conduct of the trial, as erroneous or errorless, may be in a definite way determined. This book lays down no such authoritative rules. There are none, in the field of which it treats. Its study does indeed, however, by a kind of intensive education in experience, serve to equip the student of it with a roundness and completeness of view of the problems of judicial proof; to give him a full comprehension of the evidence necessary in the proof of a case, and of the best methods of assembling and offering it. But more important than these teachings, upon the objective aspects of the trial, it gives him an insight into its subjective elements.

It shows him how the minds of men act and react, one by one, and two by two. It teaches him the importance of not only finding and assembling the necessary evidence, but of presenting it in such form to the triers that it will make the desired impact upon their minds, will accomplish the sole purpose of judicial proof—to induce in the minds of the triers the impulse to believe and to declare.

It is here that trials come to their crux. Proof is but the means to an end, that end not the enlistment of a mild or passive sympathy in the minds of the triers with a litigant's point of view, but the inducing there of the impulse to believe, the will to say in a criminal case, "Guilty" or "Not Guilty"; in a civil case, "For the plaintiff" or "For the defendant."

Any lawyer of experience knows that while facts, facts and more facts are the stuff from which verdicts are made, and that speaking generally the way ordinarily to win a fact case is to overwhelm with proof of facts, it is of the essence of the matter that the testimonial facts relied upon come before the triers in such way and so accredited as to make them not merely testimony to, but the very facts themselves.

Lawyers know that scant proof sometimes wins through the favorable impression which it makes. They know that always victory comes to that side which is able to so present its proofs as to bring the minds of the triers subject to the will and desire of the prover to believe, and to find as he asserts the facts to be.

How clear the book makes the truth appear, that "the purpose of education is not the accumulation of facts, but learning how to make facts live"; that "facts are nothing except in relation to desire"; and that, on a trial, testimony in proof of facts and facts proven, are very different things. That the one becomes the other when, and only when, the testimony has been so presented that the minds of the triers have accepted it as proof.

It is in this light that the book takes on its full meaning, establishes its worthwhileness, dealing as it does with the exercise of the power to ascertain subjectivity through objectivity, the finding out of things that move men from the things they do; the power through objectivity—the use of the evidence of what was seen and done, to induce subjectivity—belief in the minds of the triers and the will to say that the case has been proven, or that it has failed of proof.

It must not be thought, however, that the book undertakes to point a sure and certain rule to practical success in the trial. The thoughtful reader will feel its half tones, its sense of partial futility, springing from the entire absence of predictability in respect of consequences with which it deals, the results which it desires. The very nature of a trial makes this so.

Here men deal in dramatic fashion with the human equation in the most illusive forms. Here men strive for the mastery, not over each other, but over the minds of triers to induce there the will to believe and to declare.

By wealth of illustration and example the author points out how much is added to the unpredictability of results by the fact that the belief, and the will to announce it which is the end of trials, must be induced in the minds usually of ordinary men, not at all trained

in abstract reasoning, not at all versed in the principles or the problems of proof; men who know nothing of how, in a scientific way, to evaluate evidence, of how to relate fact with fact, of how to draw correct inferences from them, who are induced to reach their conclusions, and who do reach them, by the loose and ordinary methods of persuasion and inference, common to the street.

This is not all. The book makes it clear how the problems of judicial proof are made more problematical by the dramatic conditions under which they are adduced. All preparation for judicial proof looks toward, and all such proof is finally presented in a trial, an action in form dramatic in every case, and in fact overwhelmingly so in many of them; especially in criminal cases to which public interest attaches is this dramatic feature present and operative.

It affects the witnesses, the lawyers, the litigants, the triers themselves. It is this — that the conclusions of the triers do not come as the result of cold and careful reasoning upon data coolly, carefully and in a wholly non-partisan way supplied—which gives the instensely dramatic character to a trial. These conclusions are reached always in the atmosphere of drama, often under the pressure of emotional stress, and the book makes clear that it is rare that the verdict in a criminal trial, and it is of these trials that a great part of the book treats, is wholly free from the influences, the feelings, the antagonisms which litigants have been able to arouse and to inject into a case.

It is entirely true that many verdicts in criminal and in civil cases find their real spring in an atmosphere generated by the trial, where things felt but unseen, sometimes real, sometimes illusory, arising out of but more than the relevant testimony, in the end induce the verdict more than the testimony itself does.

In a trial before the judge, though the dramatic form of the trial still obtains, the dramatic atmosphere is not so vivid, so intense. It is more difficult to arouse the judge to the state of feeling which distracts his mind from, or distorts for his mind the issues in the case. He is better trained in the principles and problems of proof. He knows better how to value the pertinent, to reject the impertinent. There are many judges possessing highly trained and thoughtful minds who know not only how to judge the credibility of witnesses, but to draw correct and dependable inferences from the testimony.

It still remains that a trial is a trial, with its attack and defense, its action and its suspense, and not a scientific inquiry, which in a leisurely and impersonal way may continue indefinitely until the quest is ended.

It is of the essential nature of a trial that though its purpose is the same as that of a scientific investigation, to fully present the gathered facts which will furnish the grounds for correct induction, still these gathered facts are presented for decision in a dramatic setting, are introduced in a dramatic way, and the trial itself must come to a dramatic end in a solemn and fateful pronouncement.

An interesting part of the book is the discussion of the science of proof in relation to the trial rules of admissibility, and the showing made there and throughout the book of the practical ends in the search for truth which these rules of admissibility serve.

Taking trials as they are and have been for centuries as the best approximation available for attaining justice and accepting, as I do fully, as one of the points of merit in them that they are not rigidly formal, coldly logical; that they do allow for the influence upon the minds of the triers of that feeling of and for justice, arising out of yet more than the case itself, depending often upon "an intuition more subtle than any major premise," which, surmounting trial obstacles, by a flash of understanding and of insight brings the cause to its proper end—the great office of this book is seen.

That office does not consist in presenting formal rules, with the promise of certain success to follow their literal observance. It consists in its prime emphasis upon the cultivation, along with the habit of certainty, of accuracy in thinking, of that faculty of intuitive insight fed by and feeding imagination, "for each"—the lawyer, the artist, the judge—"the faculty that creates," which experience, actual or vicarious, alone may give.

Finally, while the book emphasizes over and over again that it is essential to the greatness of our system that trials be greatly conducted by great advocates, under the firm and steady guidance of great judges, it does make clear that if the profession can count upon skilled and trained lawyers to gather and present the proofs, and a strong and capable Bench with minds trained and personalities adequate to properly conduct trials, we need not at all trouble ourselves that the actual solution of fact issues is, in jury trials, left to untrained minds.

JOSEPH C. HUTCHESON, JR.
United States Circuit Court, Houston, Texas.

State Legislative Committees: A Study in Procedure. By C. I. Winslow. 1931. Baltimore: Johns Hopkins Press. Pp. 158, xii.—Professor Winslow has prepared an interesting and valuable study devoted primarily to a comparison of legislative committee organization and procedure in Maryland and Pennsylvania. Introductory and concluding chapters discuss the situation in other states, but the volume derives its chief interest and value from the fact that it limits itself to an intensive study of two jurisdictions. As to the states of Maryland and Pennsylvania, Professor Winslow has analyzed his materials well and presented his subject clearly. Similar studies for other states would be of value to students of legislative problems.

In Maryland and Pennsylvania, as in other states, many legislative committees have little to do, and the burden of committee work falls upon a few committees. So in Illinois the bulk of committee work in the House of Representatives is performed by the two committees on Judiciary and Appropriations.

In Maryland and Pennsylvania, as in Illinois, the legislative committees in reality determine what legislation shall be enacted, and the form of that legislation. It is for this reason important to correct defects in the legislative committee organization. The reviewer agrees with the author that the committee system should be replanned so as more nearly to agree with the subjects likely to be dealt with by proposed legislation. Except for the purpose of permitting someone to be a committee chairman, there is no value in maintaining committtees to which no measures are referred or likely to be referred. The author properly urges that committee members be appointed on the

basis of their special abilities, and this is wise, though not easy of accomplishment.

Maryland and Pennsylvania, like Illinois, present the problem of large committees so great in number as to make it difficult for a member to attend all the committees to which he belongs. The author is correct in his opinion that the number and size of committees should be reduced.

Professor Winslow's discussion of legislative committees would have been more interesting if he had analyzed the problems of a state legislature, and if he had indicated more adequately the types of measures that present themselves to such a legislature for consideration. But such a discussion would perhaps have led him too far away from the specific task to which he set himself.

WALTER F. DODD.

Chicago.

Mahatma Gandhi—His Own Story. Edited by C. F. Andrews. 1931. New York: The Macmillan Co. Pp. 372.

Mahatma Gandhi at Work—His Own Story Continued. Edited by C. F. Andrews. 1931. New York: The Macmillan Co. Pp. 407.

Few seem to know that Gandhi, who in his hour has caught the attention of the world, is a lawyer, a member of the British Bar, and one who practiced our profession with honor, if not with distinction, for twenty years. Yet such is the fact, and in these volumes, so carefully edited by a devoted disciple, we learn from Gandhi's own lips something of his life as a lawyer, and of his attitude towards the law and its practice.

Born at Porbander in 1869, the son of a high-caste Hindu official, Gandhi was reared in an atmosphere of culture, and from his youth was intended for the bar. He went through the local schools, and for a while attended Samaldas College. But he was anxious to begin his legal studies and at eighteen went to London and entered the Inner Temple. After three years of study he passed his examinations, was admitted to the bar, and returned to India to practice.

He opened an office in Bombay thinking it would afford him the opportunity of gaining experience before the High Court, and of studying Indian Law. But he did not prosper and returned to Rajkot where he had family connections. There he learned that custom required him to split his fees with the vakils[1] who briefed him, a practice which distressed him greatly, and to make matters worse he soon found that he could not get on with the British officials before whom his practice brought him. And so when a large Indian exporting company offered to send him to South Africa to represent them in a case involving two hundred thousand dollars he gladly took the retainer.

Shortly after his arrival in Natal in 1893, he attended court with his client's solicitor. In keeping with the Indian custom of court etiquette he wore his barrister's turban and when he was rudely ordered to remove it left the courtroom deeply insulted. This was but a mild precursor of the insults he was to endure as a *coolie barrister*.

He proceeded to Pretoria and entered the office of the English attorney who had charge of the case. The case turned out to be a difficult and involved one, and Gandhi set about making a careful study of the law and of the facts. He saw at once that to continue the litigation would be ruinous to both parties and he urged arbitration. This was agreed upon and he won the case.

This case, aside from giving Gandhi confidence in himself as a lawyer, taught him what he conceived to be the true function of a lawyer. He states it thus: "I realised that the true function of a lawyer was to unite parties driven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul."

The following year he applied to the Supreme Court of Natal for admission to the local bar. His application was opposed by the Law Society on the ground that the law did not contemplate having colored barristers on the roll. The court granted his application and he entered practice. Though he vigorously championed the cause of the Indians in South Africa he was a loyal subject and when the Boer War came he formed the Indian Ambulance Corps and was in the field with the British Army. He was again in uniform during the Zulu Rebellion.

In 1902 he returned to Bombay and opened a law office, but in a few months he returned to South Africa and went to Johannesburg where he was admitted to practice by the Supreme Court of Transvaal. His Lincolnian honesty in practice and his disarming frankness brought him a multitude of clients and his practice grew greatly.

He quickly became the leader and the most powerful advocate of the cause of the Indians in South Africa and how well he fought what he believed to be a fight for the right is eloquently told. The outbreak of the World War found him in London negotiating a settlement of the Indians' grievances against the South African governments. He again volunteered for military service but his health compelled his return to India.

During the war Gandhi was in India working with Indian lawyers to improve social conditions, and recruiting men for the English Army.

The Mahatma writes simply and with a telling sincerity of his life and his work. The first volume is a complete autobiography, while the second deals only with his work in South Africa. And so to those who may want to know something of a lawyer who, to a large part of the world, is a saint, I recommend the first volume, and to the more curious the second as well.

The Great Mouthpiece. By Gene Fowler. 1931. New York: Covici-Friede. Pp. 403.—The justification for noticing this fictionalized biography of the late William J. Fallon is to disapprove of the use of the life story of a lawyer to provide a central character and material for what is, in fact, a sensational story of the New York underworld. The title is particularly distressing and may require a word of explanation. In the jargon of the New York underworld a lawyer who takes criminal cases is known as a *mouthpiece*. Hence the title.

That the book may prove entertaining to some lay readers, and even to some lawyers, does not alter the fact that its title and purpose render it objectionable to the profession; except, perhaps, insofar as it points a moral.

JOSEPH HOWLAND COLLINS.

New York City.

1. Indian attorneys who pass their examinations in India.

CONGRESSIONAL ASSENT TO STATE TAXATION OTHERWISE UNCONSTITUTIONAL

An Overlooked Source of Revenue for the Constituent States, with Federal Cooperation Plan to Eliminate Vast Field of Exemptions from State Taxation, Tending to Equalize Burden of Taxes and Costs of State Government—Federal Compact Between Congress and States to Tax Agencies in Interstate and Foreign Commerce—Plea for Strengthening and Aiding Component States

By Edwin F. Albertsworth
Professor of Law, Northwestern University

WITH the convening of the 72nd Congress, in December, there are certain to be numerous bills introduced for balancing the Federal budget, as well as obtaining legislative aid making for the removal of distressing economic conditions throughout the United States. Sales taxes, tax increases, removal of tax exemptions, bond flotations, a system of dole relief—all these means, and more, will be urged upon the Federal Congress by well-meaning congressmen and by organized lobbyists. Some of these proposals will probably be economically sound but others unsound, and, from the standpoint of both Federal and State Governments, some will be impossible of accomplishment without amendments to the Federal Constitution. If, as a people, we are to remain loyal to basic Federal constitutional provisions and to conceptions, proved desirable by experience, of the relationship of the individual to the State, without increasing Federal interference or paternalistic programs, some plan must be devised also that will more directly aid, if possible, the State governments in carrying on their activities. Under present judicial decisions, particularly of the Federal Supreme Court, the States of the Union have been restricted more and more in their activities where they come in conflict with agencies over which the Federal Government also has jurisdiction. Are the States passing more and more into the twilight? Some publicists have declared that the States have already become mere geographical units, apathetically abdicating before the onward sweep of federalism. Mr. Justice Holmes has also sounded a cautionary note, concurred in by a few of his colleagues, that he has not yet "adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable."[1] And Mr. Justice Brandeis has wisely remarked that *stare decisis* must not be blindly followed in making the "delicate adjustment of conflicting claims of the Federal Government and the States to regulate commerce" where former decisions have been shown to be mistaken, for "the logic of words should yield to the logic of realities."[2]

1. Baldwin v. State of Missouri (1930) 50 Sup. Ct. Rep. 436, at p. 439 (dissenting opinion).

2. Di Santo v. Pennsylvania (1927) 273 U. S. 34, at pp. 42 and 43 (dissenting opinion).

The costs of government, both Federal and State, have enormously increased within the past decade, due both to the phenomenal increase in those problems where State and Federal regulation appear necessary, and to excessive expenditures by wasteful legislators. The economic state which has resulted from an industrial and mechanical civilization has forced the American States, as well as the Federal Government, more and more into legislative activity and into undertakings which, in an earlier stage of civilization, were regarded beyond the functions of the State. But man is an economic animal first, and a political animal later, so that it may be questionable how far older notions of more limited functions and activities of the State are still useful and practicable in modern times. However this may be, the fact is that numerous administrative agencies, involving large increases in the personnel of government, have arisen, calling for more and more revenue and increased costs of operation of government, involving taxation, borrowing and spending on the part of government. Extravagance and waste by politicians in office, for strengthening the political machine and improving political relationships, have probably also increased the costs of government. Excessive spending may be a cause—perhaps the largest cause—of high taxes, and certainly reforms are needed in this connection. And duplication of the units of government, especially in local government, have been additional factors in the high costs of government. Governor Lowden has recently reminded us of this great truth, and has advocated the unification and consolidation of many local governmental units.[3]

But even for what are regarded as present-day more or less legitimate functions of government, there are huge demands on State governments that must somehow be met by revenue measures, rather than by mortgaging the future and compelling posterity to pay the bill. At the same time, there will be a limit even to tax measures, if business or real estate is not to be weighed down by undue burdens. At present it is a notorious fact that real estate is heavily burdened with State taxes, bearing a disproportionate share of the costs of State government, and challenging its old time supremacy as the safest or best type of investment. Wealth is flowing into other forms of property as a result, to the detriment of the safety and

3. Address before Illinois Chamber of Commerce, Chicago, Oct. 10, 1931.

welfare of the State. Moreover, there are heavy taxes on transmission or inheritance of real property, both by the Federal and State governments, mitigated somewhat, it is true, by the present Federal inheritance law which allows a credit to those paying a State inheritance tax.[4] The urge should be, through legislation, to force other forms of wealth and activities of business to assume a part of these burdens carried now by real estate, not to victimize these other forms of wealth, but more equitably to share the burdens of governmental costs. Then, there are numerous tax exemptions on securities, and on incomes of a certain amount, with the result that not only many forms of wealth are not contributing to the costs of government, but also numerous individuals are not paying their proportionate share. The substantial effect of all this is that the burden of taxation rests unequally on wealth's various forms, and if something is not done about it by the government, State and Federal, we shall have a most serious situation on our hands.[5] The American Bar must bestir itself, as a leader of public opinion, and focus the attention of Federal and State legislators on the problem. Attention must not be permitted to wander; it is time for activity and a constructive program.

Despite the fact that the costs of State government are mounting, and of course also those of Federal Government, the efforts of the constituent States to tax businesses and enterprises that should be made to share the burdens of government through taxation, are being more and more restricted because of applicable provisions, as construed by the courts, of the Federal Constitution. This is especially so with regard to agencies operating in interstate and foreign commerce and State attempts to tax them. The fashion, according to which the States are hemmed in and hamstrung, is by declaring the taxes or licenses imposed on these agencies to be "direct" restraints or "burdens" upon interstate trade,[6] even though there be no appropriate, applicable Federal legislation within the same field of interstate or foreign commerce activity. The effect of the taxes imposed is said to be direct and burdensome, thus obviating the necessity for the doctrine, well settled in constitutional interpretation, that Congress not having acted, the State governments, with impunity, may do so. The result, therefore, is to allow businesses in their interstate activities to escape all taxation, either by the States or the Federal Government; and, as the present industrial era is essentially one of large-scale enterprises, ramifying throughout the component States, obviously it requires no demonstration to prove that vast sources of tax revenues are denied to the constituent States, thus forcing them to increase their taxes in other fields, to the detriment of those affected, and, perhaps, to the ultimate detriment of the State and social structure. No serious fault is being found with the judicial decisions, largely by the Federal Supreme Court, which have reached the viewpoint that these taxes are undue burdens or direct restraints upon interstate trade, although some of the decisions are by a divided court.[7] The decisions themselves flow partly from the ever-increasing expansion of the powers of the Federal Government into the internal affairs of the States, on the theory of protecting, furthering, or making plenary, conceded Federal powers, and of course also from the belief on the part of at least a majority of the justices that sound public interest requires that the avenues of interstate trade should be kept free and open, untrammelled by onerous and burdensome State taxation. With the vast number of precedents creating an atmosphere surcharged with federalism, it is a matter of comparative simplicity for a bench of judges to hold that a given tax levied by a State government on agencies engaged in interstate and foreign commerce must be stricken down as repugnant to constitutional provisions because substantially interfering with the free flow of interstate trade. Whether or not the decisions can be reconciled on any clear doctrinal analysis, is indeed questionable, due to the type of business or the activities involved, and the degree of the tax or license imposed by the State or States.[8] No precise boundaries are possible within this domain of State activity over persons and property "affected with an interstate or foreign character," nor at what precise point police measures or inspection laws of the States are justifiable as not in conflict with the free flow of commerce between the States. The field is highly uncertain and the jurisdiction for taxing purposes of the State governments, highly restricted, with consequent diminution to them in revenue, and disproportionate tax burdens on persons, property, and business of an intrastate character. Something must be done about it through appropriate Federal legislation, in cooperation with the States, and I emphatically urge that Federal and State legislators focus their attention on the problem presented, and the suggested machinery under which it may be accomplished, as hereinafter developed.

A Proposed Federal Compact Between the Federal Congress and a State or All the States of the Union

If, from the standpoint of wise and sound policy, it be determined that increased taxing powers ought to be given the constituent States over agencies now beyond the power of the States, such as those engaged in interstate and foreign commerce,[9] it is submitted that cooperation between the Federal Congress and the States, or a State, is vitally necessary in order to work out a solution. Otherwise, we may have a more drastic or revolutionary method to more effectually equalize the burdens upon a few forms of wealth in the form of State taxation for the costs of State government. It is believed that such cooperation between the Congress and the States is not only feasible in virtue of existing constitutional and governmental machinery, as well as judicial decisions paving the way, but that it is most necessary and desirable that some cooperative scheme should be worked out. Within the past decade, in American constitutional polity, the spotlight of professional legal opinion has been thrown on the potentialities, for cooperative interstate action, of the "compact clause" of the Federal Constitution, as embodied in Art. 1, sec. 10, cl. 2, providing that "No State shall, without the consent of Congress . . . enter into any agreement or compact with another

4. Cf. Florida v. Mellon (1927) 273 U. S. 12, and see further, A. W. Machen, Jr., 'The Strange Case of Florida v. Mellon," 13 Cornell Law Quarterly, 351.

5. In my judgment, the whole problem of taxation exemption must be given serious study by American legislative assemblies.

6. Cf. "Direct and Indirect Restraint of Trade," 22 Illinois Law Review, 197, and "Various Theories Over Interstate Commerce," 22 Illinois Law Review, 304.

7. See the impressive list of cases qualified or explained, given by Mr. Justice Brandeis, in his dissenting opinion in Di Santo v. Pennsylvania, supra, Note 2.

8. Cf. Willoughby, "The Constitutional Law of the United States" (2d ed.) vol. 2, chap. LX, and chap. XLIII.

9. It is, of course, understood that the individual States are not expressly prohibited by the Federal Constitution from taxing exports from one State to another sister State. The language of Art. 1, sec. 9, cl. 5, restricts only the Federal and not the State Governments, as follows: "No tax or duty shall be laid on articles exported from any State."

State."[10] In an age of machinery and large-scale industry, knowing no artificial State boundaries, it was natural that uniform laws and regulations of industry and competitive conditions should be urged, both to further the legitimate objectives of industry and to check attendant abuses. A field of action presented itself where, because of the peculiar federal structure of American government, federal jurisdiction was lacking or inadequate, and where State action alone, but of a cooperative interstate character, was indispensable. Hence, the compact clause in Art. 1, of the Federal Constitution, was seized upon and given attention, as well as practical employment, which otherwise it would not have received. Not only because of industry, but also in numerous cooperative undertakings between the constituent States, was this device employed, with the consent of the Congress.

Similar attention should now be given by the legal profession and Federal and State legislators to the problem of furnishing a greater source of revenue to the State governments, as well as equalizing and incidentally lifting the burdens of taxation on the few in the interests of the costs of government. The nature of the cooperation now, however, is between Federal Government, particularly the Congress, and the component States, or an individual State, of the Federal Union. While there is no *express* power conferred in the Federal Constitution upon the Congress to enter into compacts with the individual States in these matters, it would seem inevitably to follow that there is such an *implied* power, in raising revenue for the United States by means of State cooperation, as will hereinafter appear. Federal legislation by way of consent of Congress, may be necessary to effectuate this so-called compact now being projected, and to initiate the Congress into action may require the employment of the interstate compact device among the constituent States as an antecedent step. United action among the several States would appear to be the most effective method of urging upon the Congress recognition of the problem of widening the scope of State taxation over subjects within the concurrent control of the Federal Government, in order to circumscribe the effect of numerous judicial decisions which have hamstrung the States in this field. Greater revenues in the State treasuries will enable the component States more effectively to discharge their own responsibilities, rather than pass them on to the Federal Government, as is the too prevalent practice. It will tend to the preservation of local and State institutions from decay and disuse, and strengthen our basic constitutional fabric as we understand and practice it. And precedent is not wanting for such a proposal. We are already familiar in American constitutional polity with the device of Federal and State cooperation, through quasi-compact devices, in road building, land grant colleges, maternity hospitals, etc., where the States are invited to contribute an equal proportion of State monies with those from the Federal Government. Whatever criticisms have been made of this practice which permits the Federal Government to "buy" its way into the internal affairs of the States, are not now pertinent, for the scheme which I am suggesting gives to the Federal Government no authority over the component States, for none is claimed. The Congress consents that the States may tax certain instrumentalities, such as imports and exports and, in return for furnishing the machinery and expense required, the Congress enters into a particular type of agreement by which Federal monies are turned over to the States who are parties to the undertaking. Just how this will be effectuated will now be detailed.

10. Cf. John H. Wigmore, "Uniformity of Law—Compacts Between States," 19 Illinois Law Review, 479, and Report by same author, adopted by Commissioners on Uniform State Laws, 1921; and see further, Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale Law Journal, 685.

Constitutional Machinery for a Proposed Compact Between the Federal Congress and One or More of the Constituent States Enlarging Their Powers of Taxation Over Certain Forbidden Subjects

The constitutional machinery, as distinct from judicial decisions in similar fields, extending permission to the constitutent States to increase their taxing powers over agencies committed to Congressional sanction or control, is found in Art. 1, sec. 10, cl. 2, as follows:

> "No State shall, *without the consent of the Congress,* lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

Constitutional construction through judicial decision has settled beyond dispute that the words "imports and exports" apply only to articles imported from or exported to foreign countries, and not to goods transported from one State of the Union into another;[11] as to the latter, of course, taxes imposed by the States would encounter the objections of "direct" restraints or "burdens" upon interstate trade, thus negating the power of the individual States in the premises. As to taxes upon imports from or exports to foreign countries, therefore, the Congress may give consent, under the above constitutional provisions, that the States of the Union shall have the appropriate power to levy, but for "use of the treasury of the United States." Hence, if by compact between the Congress and a State or States, congressional assent were given to tax imports and exports, and a certain aliquot part of the proceeds after the monies were turned over to the United States treasury, be appropriated to the States availing themselves of the consent, or who were parties to the compact, an added source of revenue would be possible to the States not now obtainable by present constitutional methods. Since "all such laws shall be subject to the revision and control of the Congress," the suggested compact would not irrevocably bind the Congress, which could be cancelled by the Congress at any time, or if consent appeared in the form of an enabling act, could be repealed at the will of Congress. No contract is absolute, even though made between private parties, for every agreement has a "congenital defect," to employ a Holmesian expression, in the form of implied conditions. Hence, no insuperable objection can be raised to designating the consent of Congress as a compact, for consent is a broad term and is inclusive of compacts. Moreover, since the Congress itself is not levying duties, imposts, and excises, there would be no constitutional requirement on the Congress that they be uniform, for the Congress is not the taxing agency; it is the States that are allowed to tax, and they could tax or not as they pleased. Only Congress is bound to make duties, imposts, and excises uniform throughout the United States (by Art. 1, sec. 8, cl. 1); and only Congress is required in the levying of direct taxes with the exception of those

11. Coe v. Errol (1886) 116 U. S. 527, and Woodruff v. Parham (1869) 8 Wall. 123.

derived from income to apportion them among the constituent States.

Moreover, in clause 3, of the same section under consideration providing for congressional assent to various forms of State taxation otherwise forbidden, it is provided that: "No State shall, *without the consent of Congress,* lay any duty of tonnage. . . ." Here there is no stipulation that after consent is given by the Congress the proceeds from the State tax must be returnable to the treasury of the United States. By inference, then, the proceeds may be kept by the levying States. The advantage of allowing the levying States to retain the proceeds of the taxes collected would be that no affirmative act of appropriation by the Congress would be necessary. Just what amount of revenue would be realized from the imposition of tonnage duties is conjectural, those States having water-borne commerce obviously profiting, while those having none or little, obtaining nothing or little of value from this particular provision of clause 3. All States, however, would benefit from levying consent taxes upon imports or exports, as already discussed, from or to foreign countries.

Apparently, there is no absolute requirement in the Federal Constitution as to the manner or mode of consent by the Congress to the imposition of certain kinds of State taxes otherwise unconstitutional. It would seem, therefore, giving the word "consent" its broadest scope, the Congress might manifest that consent by formal agreement, by legislative enactment, by subsequent ratification, or even by Congressional Resolution.[12] The preferable method, in my judgment, would be a general enabling statute of Congress providing for the particular State taxation as to imports, exports, and "duty of tonnage." This method, although not strictly a compact, would clear the atmosphere of its present fog of uncertainty and remove many doubts as to the powers of the States in the premises. Particularly is this desirable when revenue is involved; for the States must be able to rely with certainty on probable income in order to balance their budgets, without incurring the hazards of litigation over refunding of taxes, or those of obtaining subsequent congressional assent to the taxes imposed.

Inasmuch as certain of the more wealthy States might not feel the necessity of additional taxation over subjects denied them expressly by the Federal Constitution without congressional assent, there would seem to be no objection on the part of Congress offering to them participation in the proceeds of the tax after being collected for the United States treasury, if the States would provide the machinery and incur the expense in collecting and imposing the taxes on imports and exports, perhaps sharing on a fifty-fifty basis. Certainly, we have judicial precedent construing Federal grants-in-aid statutes where Federal monies have been donated for intrastate affairs, provided the State governments contributed an equal amount. The States, under my proposal, instead of contributing money as under grants-in-aid, would contribute a tax collecting agency as their part of the consideration, by means of which the United States treasury is enriched. For, under the clauses above quoted, it must not be overlooked that the Congress does not derive any power to tax imports, exports, and tonnage, for then these would have to be uniform throughout the States; but the constitutional provisions merely confer power upon the Congress to consent to the States to tax in certain instances otherwise forbidden by the Constitution without the assent of Congress. Hence, the State availing itself of the assent of Congress in imposing taxes on imports and exports for the benefit of the treasury of the United States, is really doing the Congress a favor, for which it would appear but equitable that the Federal Congress appropriate a certain proportion of the proceeds to the State or States collecting the taxes. While the constitutional provisions examined do not expressly sanction such an arrangement on the part of the Congress, judicial precedent is not wanting to sustain such a practice.[13] For certainly there would be no one with a justiciable interest who could attack the appropriation of these monies, as has been pointed out by an authority on constitutional matters.[14]

Congressional Assent to State Taxation of Agencies in Interstate Commerce Though Resulting in Direct or Burdensome Restraints

If it be thought that the analysis of the powers of the Federal Congress above given seems labored and without substantial soundness in constitutional construction, or inexpedient, it is submitted that there is yet another support for reaching a similar result, but of wider character, in increasing the taxing powers of the States over subjects which, without the consent of Congress, would be denied to the States. The added merit in this proposal is that no appropriation would be necessary on the part of the Congress by means of which the States availing themselves of the assent given would receive the revenues collected. For, under this plan, the levying States would themselves retain *ab initio* the taxes collected.

Statutory precedent for permitting the States to tax agencies used by the Federal Government comes readily to mind, in permission given by the Congress to the States to tax certain property of national banks. Here we have congressional assent manifested in the form of a Federal statute, which is of great value for the proposal now being submitted. Within certain limits, this assent by the Congress to State taxation is also applicable in the field of interstate relations.

Section 5219, of Rev. Stats., relating to State taxation of national banking associations, provides:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State,

12. Broad powers of discretion in Congress as to the manner of indicating consent under the interstate compact, would seem to argue for similar powers in Congress in consenting that the States might tax certain activities. Cf. Virginia v. Tennessee (1893) 148 U. S. 521; State v. Joslin (1924) 116 Kan. 615, 227 P. 543; State v. Cunningham (1912) 102 Miss. 237, 59 So. 76; Wharton v. Wise (1894) 153 U. S. 173; Virginia v. West Virginia (1871) 11 Wall. 59, 20 L. Ed. 67. In Altman & Co. v. United States (1912) 224 U. S. 583, the Court sustained the power of the Congress, in enacting a tariff law, to authorize the President to enter into executive agreements with foreign countries to fix the dutiable rates on goods imported.

13. Massachusetts v. Mellon (1923) 262 U. S. 447. The holding is that there being no justiciable interest presented by the parties, the Court could not go into the merits of this type of Federal aid legislation. The same result would seem to follow should the Congress appropriate monies to those States that had collected them for the United States treasury.

14. Judge Andrew A. Bruce, "Taxation and Federal Aid," 18 Illinois Law Review, 204. And see further, Burdick, "Federal Aid Legislation," 8 Cornell Law Quarterly, 324; Corwin, "The Spending Power of Congress," 36 Harvard Law Review 548.

county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The Congress, by an Act of February 25, 1863, provided for the organization and incorporation of national banking associations,[15] which was amended and re-enacted on the 3d of June, 1864.[16] The 41st section of the Act of 1864, provided for taxation by the Congress in the following manner: (1) a tax of one percent annually on note circulation; (2) one-half of one percent on deposits, (3) and one-half of one percent on the capital beyond the amount invested in United States bonds. Then followed the proviso, substantially as now found, in section 5219, of the Revised Statutes, providing for taxation by the States. In *Van Allen v. The Assessors,*[17] a case coming up from New York, in December, 1865, the question at issue was whether or not the State of New York, acting under the congressional assent given to tax national banks in the limited way indicated, had exceeded its power by taxing stockholders in national banks on their shares without making any deduction on account of tax exempt bonds of the United States in which the capital of the banks was chiefly invested. Upholding that part of the State law which made no such deduction, but overthrowing the other part of it which discriminated in favor of State banks, the Court said:

"It is said that Congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution, and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from Congress. We agree to this. But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act. An example of this relation existing between Federal and State governments is found in the pilot laws of the States, and the health and quarantine laws. The power of taxation under the Constitution as a general rule, and as has been repeatedly recognized in adjudged cases in this Court, is a concurrent power. The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the Federal Government." (p. 585.)

In the case of *Des Moines Bank v. Fairweather* (1923),[18] the issue was whether or not a State Board of Equalization, of the State of Iowa, might constitutionally assess the National Bank of Des Moines on its real property without deducting various securities held by it in the United States securities, the State taxing officials having taken the capital, surplus, and undivided earnings as the value of the corporate shares, which were taxed to the stockholders, and from this amount deducting the actual sum invested in real property. In upholding the power of the State, under the statutory congressional assent, to thus tax the national bank, the Court [VAN DEVANTER, J.] said:

"It is settled that the relation of the national banks to the United States and the purposes intended to be subserved by their creation are such that there can be no taxation, by or under State authority, of the banks, their property, or the shares of their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation. . . . The congressional assent and the terms and restrictions accompanying it as existing at the time of this assessment are found in Rev. Stats., sec. 5219. . . . This section shows, and the decisions under it hold, that what Congress intended was that national banks and their property should be free from taxation under State authority, other than taxes on their real property and on shares held by them in other national banks; and that all shares in such banks should be taxable to their owners, the stockholders, much as other personal property is taxable, but subject to the restriction that the shares be not taxed higher than other taxable moneyed capital employed in competition with such banks, and to the further restriction that the taxing of the shares of non-residents of the State be at the place where the bank is located. . . .

Thus it will appear that in jurisdiction of a concurrent nature, the Federal Congress has assented to taxation by the constituent States of national banks in certain of their business aspects, the Federal Government, however, at the same time, also taxing these banks in certain of their activities. And of course the taxing States retain the taxes collected in their own treasuries. Hence, it would further seem that merely because the Congress also taxes a business or agency with interstate activities, does not, *ipso facto,* withdraw that subject from State taxation. It is somewhat analogous to a State income tax and a Federal income tax; both may co-exist without necessary conflict, there being, of course, no question of concurrent jurisdiction present in the illustration. But does it not follow that the language of the Supreme Court, in the *Van Allen Case,* relating to congressional assent to the States to tax agencies in a concurrent field of Federal and State jurisdiction, would sustain similar congressional assent to the States to tax activities in interstate commerce, inasmuch as the field is a concurrent one? And would it not also be inclusive of foreign commerce activities, as they also found a *locus* within the component States? For if the State taxes were not levied on exports, but merely on other types of activity, there would be no duty on the States to return the proceeds into the United States treasury.

Congressional Assent to State Taxation of Agencies in Interstate Commerce Resulting in Complete Prohibition of Said Commerce

If it should be felt that still other factors operate constitutionally to preclude State taxation in interstate commerce not found in the precedent of congressional assent to the States to tax national banks in certain limited directions, it is submitted further precedent is available to circumvent such possible objection. This is to be found in the decisions upholding the various congressional statutes, enacted prior to the Eighteenth Amendment, authorizing those component States of the Union having a dry policy, to prevent the introduction of liquors into their borders in violation of such policy, even though in the channels of interstate commerce.

The Wilson Act of August 8, 1890,[19] was the first step by the Congress of the United States allowing the individual States expressly to interfere with the shipment of commodities in interstate commerce, which, but for the congressional assent, would have been an unconstitutional or unauthorized act on the part of the States. In *Leisy v. Hardin,*[20] decided earlier in the same year, the Federal Supreme Court had stricken down a statute of the State of Iowa, which had prohibited the introduction of liquor into the State by interdicting its sale in the State in its original package. The Court said: "While by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter

15. 12 Stat. at Large, 665.
16. 13 Stat. at Large, 99.
17. 3 Wall. 573.
18. 263 U. S. 103.
19. 26 Stat. 556.
20. 135 U. S. 100.

which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, *unless placed there by congressional action.* . . . We hold, that *in the absence of congressional permission to do so,* the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer." The Wilson Act, above mentioned, sought to circumvent the decision of *Leisy v. Hardin,* in fact, was rested on the exception expressly indicated by the Court in its opinion, by providing that "intoxicating liquors . . . transported into any State or Territory or remaining therein . . . shall upon arrival . . . be subject to the operation . . . of the laws of such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." In the important case of *In re Rahrer, Petitioner* (1891),[21] this statute enacted by Congress was upheld, the Court [FULLER, C. J.] saying:

"By the first clause of section 10 of article 1, of the Constitution, certain powers are enumerated which the States are forbidden to exercise in any event; and by clauses two and three, certain others, which may be exercised with the consent of Congress. As to those in the first class, Congress cannot relieve from the positive restriction imposed. As to those in the second, their exercise may be authorized; and they include the collection of the revenue from imposts and duties on imports and exports, by State enactments, subject to the revision and control of Congress; and a tonnage duty, to the exaction of which only the consent of Congress is required. Beyond this, Congress is not empowered to enable the State to go in this direction. . . . The power over interstate commerce is too vital to the integrity of the nation to be qualified by any refinement of reasoning. The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. . . . No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

In view of the fact that the Court had held previously, in Bowman v. Railway Co.,[22] that transportation, purchase, sale, and exchange of commodities in interstate commerce were national in character, and must be governed by a uniform system, absence of regulation by or the silence of the Congress did not authorize the States to interfere with interstate commerce, even though, were not the subject national in character, they might with impunity do so. Under the *Rahrer Case,* therefore, the holding was that since Congress, by the Wilson Act, had allowed State laws to operate on interstate transportation by prohibition of liquor in its original package into dry States, it had indicated its will that to this extent interstate commerce might be regulated by the individual States.[23]

Under the Webb-Kenyon Act of March 1, 1913,[24] Congress supplemented its legislation of 1890, by prohibiting the use, under Federal criminal penalties, of interstate transportation facilities for transport of liquor into dry States. In *Clark Distilling Co. v Western Maryland Railway Company* (1917),[25] the Federal statute was upheld, [WHITE, C. J.,] saying that the subject-matter was one "as to which both State and Nation in their respective spheres of authority possessed the supreme authority before the action of Congress which is complained of," and that the power was plenary in Congress to enter into cooperation with the individual States as one form of regulation of interstate commerce; moreover, that the power of Congress "to regulate interstate commerce is not subject to the restriction that regulations shall be uniform throughout the United States."

The various steps of cooperation between the Congress and the dry States, prior to the Eighteenth Amendment, which illustrate the potentialities of congressional assent for the problem under scrutiny, have been stated as follows:

"Congress, in the Wilson Act, gave the States the right to regulate sales in original packages. Later, it passed the Webb-Kenyon Law, which withdrew from the protection of the interstate commerce clause liquors being transported for use contrary to the laws of the State into which they were being transported. Still later, by the Reed Amendment, Congress made it unlawful to transport in interstate commerce liquors into a State whose laws prohibited their manufacture or sale for beverage purposes."[26]

The pertinency of these decisions should be obvious for our purposes. For if the Congress may authorize the individual States entirely to prohibit, by congressional assent, the importation of commodities from sister States, and, in fact, to accomplish this purpose the more effectively, itself prohibit the use of interstate transportation facilities, it would seem to follow that the lesser power also existed, namely, to authorize the States to tax these agencies engaged in interstate commerce, although operating as a "burden" or "restraint" on trade, for while a tax might be so prohibitive as to amount to a cessation of the business itself, in normal events, it would not be, as it would defeat the purposes of the State, viz., to collect revenue for the purposes of State government. If it be said that the liquor cases rested on police regulations of the States, rather than upon their powers to tax these interstate agencies, the answer must be that such objection is without merit,[27] for the real question is whether or not the subject-matter is one primarily within the power of Congress, in the sense of negation of power to the States until Congress assents, or within both that of Congress and the States. And if within the primary power of Congress, it would seem that by congressional assent, Congress could recognize State laws as thus far modifying its sole power in the premises. Of course, if exclusively in Congress, it is conceded no power could be allowed to the State by the consent method on the part of Congress.

Until the State governments reduce their expenditures, either by elimination of extravagance or reduction of their sphere of State action in a modern, industrial era, greater sources of revenue must be made available for their purposes. The recent decision of the Federal Supreme Court, sustaining a State tax on chain stores (*State Board of Tax Commissioners of Indiana v. Jackson*),[28] may be significant as a tendency in the direction of allowing greater scope to the State taxing power. But the apparent counter movement on the part of the same Court, in restricting the States in the taxation of intangibles,[29] might argue the contrary, as it, to some extent, deprives the individual States of revenue once permitted to them. However we may read these decisions, the essential point is that agencies using interstate and foreign commerce within the territorial United States can be made to pay greater revenues to States in which they are operating, by the method that I have suggested. Whether or not from the standpoint of sound policy they should be made to do so or not, is beside the question. The essential point is that, constitutionally, they can be made to contribute by the methods above detailed.

21. 140 U. S. 545.
22. 125 U. S. 465.
23. Further case developments are to be found in Rhodes v. Iowa, 170 U. S. 412; American Express Co. v. Iowa, 196 U. S. 133; Pabst Brewing Co. v. Crenshaw, 198 U. S. 17; Rosenberger v. Pacific Express Co., 241 U. S. 48.
24. 37 Stat. at Large, 699, c. 90.
25. 242 U. S. 311.
26. W. L. Frierson, "Amending the Constitution," 33 Harvard Law Review, 659, 665.
27. There is some holding that under the Wilson Act, authorizing the dry States to restrict alcoholic liquors from being transported and introduced into the State, a State might impose a license tax on the sale of such intoxicating liquors brought in from a sister State or a foreign country. Cf. State v. Frederick De Bary & Co. (1912) 130 La. 1090, 58 So. 892 (affirmed, 1913), 33 S. C. 239, 227 U. S. 108, 57 L. Ed. 441.
28. 51 Sup. Ct. Rep. 540.
29. As in Baldwin v. Missouri, supra, note 1, and Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204.

CONFERENCE OF BAR ASSOCIATION DELEGATES AT ATLANTIC CITY

Chairman Knight Speaks of Accomplishments to Which Conference Has Materially Contributed—Notable Addresses Delivered—Thorough Discussion of Compensation for Automobile Accidents—Cooperation Between Press and Bar—Progress of "Bar Reorganization" Project—Judicial Selection—Committee on Rule-Making and Judicial Councils Receives Endorsement of Plan for Promoting Cooperation Between Federal Bar and Conference of Senior Federal Circuit Judges—Congress of Comparative Law—Bar Organization Committee Reports Increased Impetus in Enactment of Bar Organization Acts

By Herbert Harley
Secretary, Conference of Bar Association Delegates

IN opening the sixteenth annual convention of Bar Association Delegates at Atlantic City on Sept. 15, Chairman Harry S. Knight spoke briefly of the accomplishments to which the Conference has materially contributed. Chief of these were the enactment of bar organization statutes in nine states, the activity of state bar associations in preparing for official status in nine other states, and the establishment of judicial councils in twenty states. He referred also to the development of bar influence in the selection of judges, and paid a tribute to the memory of the late Josiah Marvel and Frederick W. Lehmann.

The program of the Conference was even more heavily weighted than usual. There was a thorough discussion of the subject of compensation for automobile accidents in the form of a symposium which permitted the presentation of conflicting theories and practice. It was not intended that this should lead to a decision by the delegates. The committee reports, printed in advance, showed constructive work on a number of lines, but nothing which could be considered novel. The most valuable contributions in some respects took the form of addresses. Mr. Charles H. Tuttle, recently United States District Attorney in New York City, spoke on The Ethics of Advocacy. The Lawyer's Franchise was the title of Mr. Julius Henry Cohen's address. Mr. Alfred Huger spoke in reminiscence of the career of a South Carolina lawyer, with mingled humor and pathos which charmed his audience.

The election of officers resulted in the following selections: chairman Philip J. Wickser; vice-chairman, David A. Simmons; members of the council for four years, Charles A. Beardsley of California and Robert H. Jackson of New York; member for two years (to fill Mr. Simmons' place), Frank W. Grinnell of Boston.,

The meeting authorized a message of good will to Mr. Elihu Root, founder of the Conference, a former chairman and now honorary member of its council.

The Conference heard two excellent addresses on compensation for automobile accidents at its 1930 meeting, one favoring the idea, and the other in opposition (Journal A. B. A., Vol. XVI, No. 11 for the full text). It has not been the intention of the Conference to take a stand on this perplexing question. So it was appropriate at the recent meeting to allow Mr. Henry S. Drinker, as chairman, to preside over a symposium in which various views were advanced. After the chairman's introductory statement Mr. Frank S. Kellogg made the argument for compulsory compensation in a manner analogous to the system obtaining in industrial accidents. The objections to this idea were presented cogently by Mr. Gay Gleason, of Massachusetts. Mr. Frank W. Grinnell, of the same state, then told about the operation of the Massachusetts statute, intended to facilitate litigation of such claims.

Chairman Drinker said that "Nineteen states have passed laws in the nature of the Connecticut act, which is the outstanding example of providing for financial responsibility, the idea being that anybody who has been mixed up in a motor accident must show that he has financial responsibility, or otherwise his license is revoked. The obvious criticism of that is that it is locking the stable after the horse has been stolen. Then there is the Massachusetts plan of compulsory liability—that everybody who goes upon the road has to have insurance. . . . It has not been an unqualified success." The third proposal, not yet enacted, is for compulsory insurance coupled with liability in every case of accident caused by a motor vehicle, irrespective of negligence.

Those who participated in the discussion after the three principal speakers had been heard were Howard D. Bailey, New York; Harry P. Lawther, Texas; Borden Burr, Alabama; A. E. Gold and Harrison C. Glore, New York; Orlando H. Dey, New Jersey; and George Palmer Garrett, Florida.

Copies of a draft act prepared by Mr. Frank S. Kellogg were distributed. It is obviously impossible to set out the arguments advanced by the speakers, the questions and replies, in this report. Readers interested in the subject would do well to correspond with Mr. Henry S. Drinker, of Philadelphia.

Committee on Co-Operation Between Press and Bar[1]

For the committee on Co-operation Between Press and Bar, Chairman Andrew R. Sherriff supplemented his printed report by speaking of the growing interest in this subject, both by editors and judges, well illustrated by the fact that the Judicial Section, meeting on the succeeding day, had arranged a symposium in which Mr. Sherriff, Mr. David Lawrence, chairman of a like committee created by the Society of Newspaper Editors, and Judge Eugene O'Dunne, of the Baltimore City Supreme Court, participated. The tendency of bar associations to concern themselves with the matter of "public relations" also illustrates the growth of this movement. Mr. Barnett E. Marks, of Arizona, suggested that the committee might well be concerned over the disposition of moving picture producers to depict court scenes in a manner which lessens popular respect for the judiciary.

Progress of "Bar Reorganization" Project

Mr. Philip J. Wickser, a member of the committee on Bar Reorganization created by the Executive Committee of the American Bar Association, reported on plans and progress. In issuing the first call for a national meeting Judge Simeon Baldwin, father of the American Bar Association, had in mind a federation of the bar of the entire country, Mr. Wickser explained, but conditions made this plan impracticable. A few years later the short-lived National Bar Association was formed on this theory. It was subsequently, because of such a need, that President Root in 1916 created the Conference of Bar Association Delegates, which has served as a link between the national and local organizations of the bar. More recently the ideal of organic relations between the state bars and the American Bar Association found expression in various ways and finally came the committee created by the Executive committee and headed by Mr. Jefferson P. Chandler. This committee reported the outlines of a plan to the Executive Committee, which referred it to the General Council, and favorable action had been recorded by the General Council after prolonged discussion on the preceding day. Mr. Wickser spoke of the importance of interest on the part of delegates to the present convention as an aid to the committee in promoting consideration of this subject among lawyers' organizations throughout the country.

Judicial Selection

The work of the committee on Judicial Selection is confined to the matter of bar influence in respect to the nomination, election and appointment of judges. In the absence of the chairman, Mr. Austin V. Cannon, of Cleveland, his partner, Mr. Lawrence C. Spieth, supplemented the chairman's printed report with brief remarks. He suggested that bar associations interested in this subject would do well to correspond with the committee, for the benefit of both parties.

Rule-Making and Judicial Councils

This committee, as appears by the printed report, limited its suggestions this year to a single matter, that of developing a plan for promoting co-operation between the federal bar and the Conference of Senior Circuit Judges of the federal system. Chief Justice Hughes spoke of his interest in this matter at the meeting of the American Law Institute in May, 1931, linking it up with the recommendation already made to the Congress for an extension of the functions of the Conference to include suggestions for legislation affecting the United States courts and their procedure. After being called into conference by the Chief Justice Chairman Grinnell worked out a tentative plan whereby the bar associations of the states should take the lead. He suggested that in each federal district three practitioners could be chosen, either by the state bar association, or by the judge, to consult as to the problems of administering the courts. Representatives of these committees would then confer, from time to time, in the circuits with the circuit judges, and finally one lawyer from each circuit would be selected to attend an informal conference with the senior circuit judges a day or two before the annual meeting in September of the Conference.

From his extended experience as a practitioner conferring with judges in the Massachusetts Judicature Commission, and since then in the Judicial Council of his state, he had come to value very highly the importance of having the bar capably represented in all discussions by the judiciary concerning the operation of the courts. He gave strong reasons for this opinion and cogent illustrations. His plan received applause from the delegates and his proposed resolution, which follows, was enthusiastically endorsed:

RESOLVED, that the plan for the organization of informal district and circuit committees of the federal bar to confer with the federal district and circuit judges in regard to the federal judicial system and its operation, and co-operate with the Conference of Senior Circuit Judges, as recommended by the Committee on Rule-Making Power and Judicial Councils, be approved. The method of selection of such committees to be determined by the state bar associations and the various federal judges in co-operation with local federal judges.

RESOLVED, that this resolution be communicated to the American Bar Association with the recommendation that it be supported by that Association.

The Congress of Comparative Law

Col. John H. Wigmore, as committee chairman, explained the nature of the Congress to be held next year in Paris, and the opportunity afforded to American lawyers to attend. This is the first international congress of lawyers to be held in about thirty years; it is devoted, not to international law, but to the law which lawyers practice daily in their service to clients; it is held for the purpose of informing those who attend concerning practical methods of dealing with legal problems in the field of private law; while bar associations are invited to send delegates any lawyer may attend (without the privilege of speaking) on payment of a fee of five dollars. In every other field but the law such international gatherings have become necessary and common. "These congresses are going to be the great controlling forces of the world outside of the machinery of law. It is not to our interest to sit still and let the rest of the world organize while we do nothing. The next generation will look back with contempt on our narrow-mindedness if it should find that we have not done our part when

1. The pamphlet containing several committee reports are obtainable from the American Bar Association Secretary's Office.

it comes to the international organization of our great profession."

In other nations the minister of justice is made the chairman of a national committee to promote the Congress, so the Conference approved a resolution offered by Chairman Wigmore that a United States national committee be created and that Attorney General Mitchell be invited to become chairman, and Mr. Justice Stone vice-chairman.

Bar Organization Committee

The report of the committee on bar organization was supplemented by an oral statement made by the chairman, Judge Clarence N. Goodwin. The report shows increased impetus in the matter of enactment of bar organization acts, South Dakota and Utah having joined the list this year, while bills passed in Wyoming and Arizona were vetoed. In Utah and Wyoming both chambers of the legislature were unanimous in their votes. The South Dakota act introduces a new feature in the movement, since it gives the bar inclusive and compulsory organization, but does not define the nature of this organization in detail. It provides for the election of a board of commissioners and leaves to the bar itself the matter of their terms, mode of selecting their successors, and so forth. It empowers the bar "to adopt such by-laws and rules not inconsistent with the laws of this state, as may be deemed necessary for its government, which by-laws and rules shall become effective upon approval by the supreme court." Provision is also made for the adoption of rules of professional conduct, with the approval of the supreme court, and violation of such rules may be punished under the procedure already provided by statute for suspension of the right to practice.

Chairman Goodwin was of the opinion that such an act might find acceptance much more readily in a number of states than the more detailed acts already adopted. Three members of his committee disagreed and two concurred, as to the policy of accepting less than has heretofore been asked from the legislatures. As to this the experience of South Dakota in the next year or two will be enlightening.

Reference was also made to the compilation of state bar acts, with citation of all cases up to February of this year, which are obtainable from the secretary of the American Bar Association and the secretary of the Conference.

Judge Goodwin reported success in completing the organization of local up-state bar associations in federations in New York, and of the action of state associations in a number of states looking toward statutory organization, adding: "There is a general movement throughout the country for the strengthening of state bar organization everywhere, regardless of the form of organization, upon which this Conference, as the inspiring factor in the movement, may congratulate itself."

The Banquet Session

The annual dinner, given in conjunction with the American Judicature Society, was a brilliant success. Mr. Guy A. Thompson delivered an inspiring oration in which he set forth the great work of the legal profession in the organization of our federal government and its promise of faithful guidance in the present time of trouble and confusion. Mr. Julius Henry Cohen discussed most forcefully the developing principle, now embodied in decisions, that the bar collectively, having a franchise, has a correlative duty to perform, and every lawyer individually owes a duty toward the bar.

The formal title of Mr. Cohen's address was: Interrelation of the Lawyer and the Business Man; Are Its Effects Good or Bad? Mr. Cohen's able speech has been slightly condensed for publication.

Address by Mr. Julius Henry Cohen

So far as my assignment goes, what I shall say is to be in a somewhat critical mood, in a spirit of analysis, with a view to strengthening our technique for the meeting of our duties and the performance of our functions, rather than with the view of inspiring you on the basis of examples of the past. Perhaps I can postulate the question that I really want to submit in the language of Owen D. Young. In his most exquisite address to the graduates of the law school this summer, in which class was his own son, he put several questions in which he bade them examine themselves to discover their own strength and weakness, and having discovered their strength and weakness, he bade them then go on with the great business of developing themselves. His first question is one which I should like to put to the Bar this evening, as Mr. Young put it to the graduating class: "Have you enlarged your knowledge of your obligations and increased your capacity to perform them?" I do not mean by that the knowledge of your capacity as individual lawyers and your ability to perform your obligations to your clients, but the knowledge of your profession, its obligations and the ability of the profession to perform those obligations. And with a view of focusing attention upon that question it has occurred to me that if we took inventory of what we had gained and what we had lost in our contacts with the business world, it might be helpful.

The outstanding factor impressed upon those of us who come in contact with business and industry is that we are in a condition of change. The present depression is largely the result of changed conditions, such as new processes of production and organization and new methods of competition. We have been obliged to revise our industrial and commercial conceptions. Are we obliged to revise and modify and qualify our conceptions of our own functions as members of the Bar?

The traditional American attitude toward industry and business is passing, the conception that the individual business man can achieve fortune by himself, that he can make his place all alone. That philosophy of individualistic competition, the each-man-for-himself philosophy came to us with the Puritans. Parkman, in his "Pioneers of France," speaks of the New England attitude toward the acquisition of wealth. He says that in the thought of New Englanders the individual's "assiduity in pursuit of gain was promoted to the rank of a duty, and thrift and godliness were linked in equivocal wedlock." The injunction of the early eighteenth century New England business man to his son clothes this philosophy in a little more homely language: "Sand the sugar, flour the ginger, lard the butter, and come in to prayers." Some business men today have not altogether departed from that attitude. We have not quite abandoned the idea of each man for himself and the devil take the hindmost.

Self-Government in Industry

But it is becoming increasingly apparent that the individual cannot stand alone, that there must be cooperation with others. And in industrial life there is a growing recognition that no industry can thrive without rules and regulations to which all subscribe. The coal industry today is clamoring for machinery similar to that proposed in the American Bar Association's "United States Industrial Arbitration Act," by which wages could be fixed for an entire industry and no competitor could take advantage of the better employers in the industry. Plans for the regulation of production by agreement, such as the Chadbourne Plan, are increasing, and as the years go on we shall have further evidences of the tendency to eliminate the "devil take the hindmost" attitude and the substitution therefor of machinery for self-government in industry.

Not a little of the new point of view in business and industry has been contributed by lawyers. Men of the capacity of Owen D. Young cannot assume executive offices in large industries without finding and analyzing the causes of distress in those industries and applying the training of their legal minds

to the solution of the problems. Men like Gary and Morrow, coming into industry and banking, apply their general knowledge and experience to the problems of business. There is scarcely any doubt that our own attitude towards legislation, our own attitude towards law has been and will continue to be considerably modified by our knowledge and experience in industry and in business, and we ourselves will contribute more and more to the solution of such problems.

On the other hand, what has business done to us and for us? There is no doubt whatever that it has made us more efficient. Does it follow that we can profitably, and I mean not for ourselves but for the community, work out the future of our profession by the use of the methods and machinery of business, or must we stop somewhere? When we have analyzed all the changes that have taken place in the attitude of industry in business, we must still accept for business, at least for a considerable time to come, the credo of business. Mooney and Reiley, two recent writers, say in "Onward Industry": "In industrial and commmercial organizations it is the attainment of a profit through service, profit in this sense meaning the compensatory material gain or reward obtained through service." However wisely organized, however broadly organized, however socially organized, in the last analysis American business rests upon that credo.

Let us compare this credo with that of the professions. I need not remind you that the essential thing with the professional man is service, regardless of compensation. This is true of the clergyman. It is true of the army engineer. We accept it in the case of the physician as a matter of course. And in our own profession when we have accepted a case, the first duty, and the last duty, and the duty all the time is the duty of service, regardless of whether we will be paid for it or not. The professional ideal is service with compensation as the *incident*, not as the ultimate aim.

Lawyer's Status Defined

In the legal profession we have in addition another ideal, a traditional ideal, an ideal which it is hard indeed to get across to the critical lay public—that the lawyer is an officer of the court. But the lawyer wears no badge, no uniform, no wig, no gown, and to people who know only lawyers whom they consult in their offices and with whom they talk over business propositions, it is confusing to speak of the lawyer as an officer of the court. Nevertheless, the traditions of the office flow consistently through the decisions of our courts, and the lawyer is held to stricter and stricter accountability as an officer of the court. In the Karlin case in New York our Court of Appeals held that the court has continuous and permanent jurisdiction over the conduct of all its lawyers and may investigate them at will. In the recent case decided by the Illinois court it was held that so far is the lawyer an officer of the court that if he serves as what we call corporation counsel, or assistant—there he was counsel to the Sanitary District—and takes pay without doing work for it, he can be disciplined for his conduct.

But I would lay emphasis upon another principle and draw your attention to certain corollaries which flow from it. The Dworken case, decided by the Court of Appeals of Ohio, is a most significant and signal illustration of the parting of the ways between the professional conception of the lawyer and the business conception of the business man. Dworken brought suit, in which he was supported by a number of lawyers, to enjoin an organization of property owners from furnishing the services of lawyers in making leases, bringing ejectment suits and the like. The thesis upon which he brought his suit, the principle upon which it was decided, was that the lawyer had a franchise which could not be infringed upon by a layman. The court, following the doctrine of the Co-Operative Law Company case in the New York Court of Appeals, sustained that position. The lawyer, they said, held an exclusive franchise, and they applied for the benefit of the lawyer all the protective equitable remedies which are applied to the holders of a franchise. That, it seems to me, is a new conception of the function of the lawyer in society.

What Lawyer's Franchise Implies

The holder of an exclusive franchise is subject to certain obligations, duties and limitations, and the franchise must be exercised in the interest of the public. Therein lies the explanation for the continued adherence to the rule that the lawyer may not solicit or advertise for professional employment. Therein lies the explanation for the philosophy that there can be no corporate practice of the law. How can there be, if the franchise to practice law is an exclusive franchise? What becomes of the notion that a corporation can, by selecting employees who are subject to its control and who are controlled by the credo of business, perform the functions of lawyers? You cannot have a corporate charter and an individual franchise at the same time. The public must choose between the two.

If that follows from the conception of the franchise, let us take one step further. Is the franchise wholly an individual franchise? Is the monopoly wholly an individual monopoly? No, it is a franchise to a group, to all lawyers who are admitted to practice law within the state. And the obligations of that franchise are not only to the client and to the court; they include obligations of lawyers to lawyers. There are collective obligations, obligations to the whole profession and obligations to the public. If that is the nature of the franchise, what justification is there for the failure of any member of the bar to belong to the agency which is to function on behalf of the whole collective organization? The fundamental philosophy underlying the conception of the Official State Bar Organization is that since we do carry a collective franchise we must function collectively. No man may forget his responsibility any more than a taxpayer may forget his responsibility for the maintenance of the collective fire department or the collective police department. Those who enjoy the franchise must carry its burden, not a few men grouped in voluntary organizations, for the whole.

My contribution here tonight is just this brief analysis of the tendency of our profession, of the tendency of business, of the interrelationship between the two and the effect each has upon the other, and the suggestion to you that we again appraise the situation, understand a little better our functions, look to the direction in which we are going. If we do, we shall come to the conclusion that we cannot stop the unlawful practice of the law on any theory that it is taking business away from us. We cannot insist upon preserving the monopoly of the franchise unless we meet the obligations of the franchise, and it is our job so to adapt our forms of organization as the better to enable us to meet those obligations.

Mr. Alfred Huger, of Charleston, South Carolina, charmed his audience with his ready flow of humor developed from personal experiences in his practice. A more delightful dinner speech is rarely heard.

Judge Clarence N. Goodwin, in view of the lateness of the hour, took only a minute to felicitate his audience on their presence and then wished them good night.

Mr. Charles A. Tuttle's address on "The Ethics of Advocacy" will be published in full in a later number of the JOURNAL.

Guides to Legal Literature of Other Nations

THE Library of Congress will ultimately publish guides to law and legal literature of the outstanding countries of the world, it was explained at the Division of Law, October 6th, when announcement was made of a forthcoming volume on Mexican law. The "Guide to the Law and Literature of France" marks the fifth in the series of guides to foreign law published by the Library of Congress. It was preceded by the "Bibliography of International Law" (1913), the "Guide to the Law and Legal Literature of Germany" (1912), the "Guide to the Law and Legal Literature of Spain" (1915), and the "Guide to the Law and Legal Literature of Argentina, Brazil and Chile" (1917). The lawyer, judge, and citizen may turn to these guides for practical information on the legal institutions of foreign countries in the solution of practical problems confronting them.

STATEMENT CONCERNING AMERICAN LAW INSTITUTE*

By William Draper Lewis
Director of the American Law Institute

THOSE of you who attended the Annual Meeting of the American Law Institute on May 6-9 will, I think, agree with me in saying that it was the most successful meeting we have had. Indeed, each of the successive Annual Meetings of the Institute has been more successful than its predecessor. This is true whether we measure the success of such a meeting by the numbers in attendance compared with the total membership, the value of the criticisms made on the Drafts of the Restatements and Acts submitted, or that more intangible but more important thing—the spirit of the meeting.

I emphasize the otherwise comparatively trivial matter of the success of our Annual Meetings because these meetings are the best outward and visible sign that the vision of the founders of the Institute is being realized. Those of us who joined in the formation of the Institute wanted to create an association that would unite leading judges, law school professors and practitioners in constructive legal work.

We selected as our first task the clarification, and as far as practicable, the simplification of the common law through its restatement. This task will be completed as far as the Subjects which we have planned to include are concerned in approximately nine or ten years from the present time. We did not believe when we started the Institute, and still less do we believe now, that the Restatement can either be well done or secure the approval of the profession, unless it is the product of the cooperation of leading judges, lawyers and law teachers. What is true of the Restatement of the Law is also true of much of the other constructive scientific legal work for the improvement of law which it is the public duty of our profession to carry on.

For successful cooperation there must be mutual understanding and respect. No effective cooperation can be carried on between those who have toward each other superiority or inferiority complexes. The discussions at the Institute's Annual Meetings, and the discussions at the conferences of Reporters for the different Subjects of the Restatement and their Advisers, have taught a healthy mutual respect for each other among schoolmen, judges and practitioners; a respect that was noticeably lacking in the earlier years of the century.

While we started the Institute with the belief that cooperation between the leaders of the three branches of the profession was essential for good results, the experiences of the last eight years have demonstrated that we misconceived somewhat the necessary extent of that cooperation. For instance, we thought that the Reporter for Contracts, or Torts, or Business Associations, would draft a chapter and submit it to his Advisers who would in conference with him make suggestions for its improvement. In a sense this is what happens. But we never thought that it would be necessary or, if necessary, possible to secure lawyers and judges who would give a very considerable portion of their time to the work, or that the Drafts submitted to the Council of the Institute would be other than the work of the respective Reporters with incidental help from their Advisers. What has actually happened, however, is that the contagious character of the spirit of cooperation, the growing feeling of public responsibility for the correct doing of an important public task, and the interest of the work itself often results in the Adviser working almost as hard as the Reporter; that the amount of time given by the Adviser who is lawyer, judge, or practitioner is far beyond what was anticipated; that the product as it comes before the Council of the Institute or the Annual Meeting is a group product; that the first Draft submitted by the Reporter to his Advisers is merely a stem around which, by the interplay of criticism and suggestion through successive conferences, is built up the final product submitted, after critical examination and amendment by the Council, in the form of Tentative Drafts to the profession. If many present and retired practicing lawyers and judges were not willing to contribute of their time and brains to the work, the Restatement would not be succeeding. It can be well done only by something much more than mere nominal cooperation between those who approach each problem from the respective backgrounds of the very different professional experiences of the student, teacher and writer, the judge, and the practitioner.

Perhaps I can best summarize the work done on the Restatement of the Law since your meeting last year by saying that while the various groups working on the Preliminary Drafts have steadily advanced their different subjects, the thought of those primarily responsible for the direction of the work has been concentrated on the completion and publication in official form of the Restatement of Contracts.

A contract between the Institute, the West Publishing Company and the Lawyers Cooperative Publishing Company has been executed under which the parties form an association known as the American Law Institute Publishers. The Association will print and publish the Restatements and the state annotations for each state. We expect to submit a complete proposed Draft of the Restatement of Contracts to the Annual Meeting of the Institute next May. We have more than a reasonable expectation that, with the adoption of some amendments, the meeting will approve the draft and that it will be published next September. Thereafter the re-

*This statement was made at the Thursday afternoon session (Sept. 17) of the meeting of the American Bar Association at Atlantic City.

maining volumes of the first Restatement of our Common Law should appear at reasonable intervals.

The fact that the Restatement of Contracts is to be the first of the subjects to be published has been known for some time and the Cooperating Committees of the State bar associations have been concentrating their efforts on the completion of their respective state annotations of that subject. As a result we are now assured that when the Official Draft of Contracts is published next September in most of the larger States and in many of the other States the state annotations will be ready for delivery with the Official Draft of the Restatement.

The preparation of these state annotations for forty-eight states is a tremendous undertaking. The work now being done shows the spirit of cooperation between the Institute and the State bar associations. Furthermore, the actual work on the annotations in each state has demonstrated that a State bar association and the faculty of the principal law school or schools in the state can effectively work together to produce annotations that will be authoritative with the courts and the bar of the state.

While all the details of price, terms of subscription, etc., for the volumes on Contracts and the remaining volumes of the Restatement and the respective state annotations have not been worked out sufficiently to permit me to go into these matters at the present time, I can make positive statements in regard to three things:

First: That the only financial cost in connection with the state annotations which the State bar associations or other local body undertaking the work will be asked to bear is the cost of preparing the manuscript.

Second: That this cost is their contribution to the success of the Restatement; it is being made with the knowledge that there will not be any financial return.

Third: That the lawyer in each state will be given the opportunity to subscribe for the complete Restatement and his state annotations and, if he desires, he will be able to secure the state annotations for any other state.

While the American Law Institute Publishers hope to make some profit over the cost of manufacture and publication, their chief concern is to place a price on the volumes and annotations that will give as wide a circulation as possible. Whatever the share of the profits going to the Institute may be we shall hold it in trust for the object of the Institute, which, as stated in our charter, is the improvement of the law.

It is now nearly eighteen months since the Institute completed its work on the Code of Criminal Procedure. Since then the adoption of the provisions of the Code in the several states is a matter which we have had to leave to the bar associations of each state. The Institute has no machinery for pressing legislation on state legislatures and does not intend to have. That is not our function. Furthermore, the problem of the improvement in Criminal Procedure by acts of legislatures or rules of court is for each state a local problem which must be handled by the representative members of the bar of the state through their state bar associations or other local agencies. This means that progress in criminal procedural reform necessarily varies from state to state. In some states nothing has been done in respect to the reforms embodied in the Model Code of Criminal Procedure drafted by the Institute. In the majority of the states, however, a special committee of the State bar association or its regular committee on cooperation with the Institute has studied the Code. In several states this study has gone far enough to enable the committee, with the backing of its State bar association, to present chapters of the Code with varying success to their state legislatures.

Feeling, as I know most of you also do, that this Code does represent in varying degrees in practically every state some distinct improvements on existing practice, the adoption of those of its salient features not already part of the state's practice, is a matter involving the education both of the bar and the public.

As far as the American Bar Association is concerned, the most helpful immediate thing that you can do is to adopt the recommendations of the Sections on Criminal Law and Criminology and appoint a committee to study the Code and to report its opinion of its provisions to your meeting next year. Such action on your part will tend to keep the matter of criminal procedure reform before the profession and the public. Such reforms move forward only as professional and public interest is maintained.

In addition to the Code of Criminal Procedure the Institute had undertaken to draft model statutes on certain subjects connected with the administration of the criminal law. During the past year we have officially published the statute on summoning witnesses to testify in another state. This statute is identical with the statute recommended to the Conference of Commissioners on Uniform State Laws by their committee on the subject, the differences between the original draft prepared by that Committee and the first tentative draft submitted to the Institute having been reconciled in a conference between representatives of the Institute and the Conference of Commissioners.

At the Annual Meeting of the Institute two other Acts were discussed; one, on the right to comment on the fact that the defendant did not testify; the other, on the right of an officer to kill in the attempt to effect an arrest. In respect to the first statute, while it has not yet been officially adopted, the majority of the Council and the majority at the meeting of the Institute favored a right to comment by the judge and both the prosecuting and defense attorneys.

Progress so far on the Act dealing with the right of an officer to kill in effecting an arrest has not been encouraging. The reporter, Mr. Edwin R. Keedy, and his group of distinguished advisers, most of whom have had long experience in the administration of the criminal law, could not come to a unanimous opinion on critical provisions. They submitted to the Council a draft in which reporters and the majority of the advisers concurred. Their draft curtailed the existing common law right of an officer to kill in effecting an arrest. The majority of the Council did not agree with several of the provisions in this draft. The differences were submitted to the last Annual Meeting. The result was an interesting debate and a majority vote for a more extended right of the officer to kill in the at-

tempt to effect an arrest than is now permitted at common law. Many radically different opinions were expressed with great confidence. If this Association wants to stage a lively meeting, I suggest the subject. Whether the discussions we have had, and perhaps shall have, will ultimately result in a considered and sufficiently unanimous opinion on the present matters in controversy remains to be seen. Personally, while I think the discussion has started many people thinking on an important subject, I have no desire to hurry the preparation of an Act.

For the past eighteen months we have been working on an Act on Double Jeopardy—one of the most difficult and confused subjects in criminal law. A Preliminary Draft, accompanied by extensive commentaries on existing constitutional provisions and their interpretation by the courts, is now under consideration. It is hoped that a model Act on the subject will be submitted to our Annual Meeting next May.

At your annual meeting last year you adopted a resolution authorizing and directing your Section on Criminal Law and Criminology to ask the Institute to appoint representatives on a Joint Committee representing both associations, the object of the Joint Committee being to consider the lines along which this Association and the Institute can cooperate to promote improvement in criminal justice. As a result of the events detailed in the Report of this Joint Committee which you will consider later at this meeting, the Committee has developed into a Joint Committee of this Association, the Institute and the Association of American Law Schools. As its Chairman, I can testify to the labor which has been spent on the Report. Criminal Justice in this country is a national disgrace. There is no question but that the lawyer has a greater responsibility for its improvement than any other profession or class. Let us hope that this Report of the Joint Committee, representing as it does the three principal national legal professional associations, will help to point the way to intelligent and sustained effort for improvement. The Report suggests a program for the work for the Institute which can be carried out only if the work commands the approval of those members of our profession whose opinions rightly have weight, and the necessary financial support is secured. These matters await the event. But as Director of the Institute I should like to say here that I would not think for a moment of asking its Council to consider undertaking this or any other important work if I did not feel that I could count on the continuance of the spirit of co-operation now existing between the Institute and this Association.

Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Washington Letter

1266 National Press Bldg.,
Washington, D. C.,
November 9, 1931.

Courts Expediting Decision of Criminal Prohibition Cases

THE records for the fiscal year which ended June 30, 1931, in the division of the Department of Justice having charge of litigation pertaining to taxation, prohibition and kindred matters, show a number of interesting facts regarding the progress made in litigation of this character.

As evidence of the results obtained in the efforts of the Department to speed up action on cases pending in the courts, the records show, with respect to criminal business arising under the national prohibition act, that while there were 396 more cases begun during the last fiscal year as compared with the preceding fiscal year, there were 8,831 more cases terminated than during the previous year. In fact there were 61,268 cases terminated in the last year compared with 52,437 in the previous year. Reports to the division from the various districts show that jury trials in prohibition cases numbered 323 less than in the former year, and 48,791 cases were concluded by pleas of guilty, or 8,561 more such pleas than during the preceding year.

Some typical districts in the record show the character of the disposition of these criminal cases in the courts. In the Southern District of New York, 9,248 cases were terminated, with 90 per cent on pleas of guilty. In the Eastern District of Kentucky, 3,568 cases were terminated, with 82 per cent on pleas of guilty, and 12 per cent by jury trials. In the District of Columbia 3,306 cases were terminated, 63 per cent being convictions and 36 per cent, omitting fractions, being acquittals. In western New York, 2,232 cases were terminated with 58 per cent convictions and 41 per cent acquittals. In northern New York 1,980 cases were terminated and in the trials in that district 66 per cent resulted in convictions and 34 per cent in acquittals. In the Eastern District of New York 1,890 cases were terminated with 50 per cent convictions and 49 per cent acquittals. In Montana 1,436 cases were terminated, with convictions of 93 per cent in the trials held and acquittals in 6 per cent.

There was a total of 12,374 civil cases commenced under the National Prohibition Act, or 492 more than in the previous year. The number terminated, however, was 835 less, leaving 6,975 civil cases still pending. There were 6,620 common nuisances closed during the year for periods from three months to a year. This was 2,181 less than the year before.

With respect to litigation growing out of the taxation laws of the United States, 380 appeals from the Board of Tax Appeals were pending in the Circuit Courts of Appeal. Of 303 appeals from that Board during the year, 239 were filed by taxpayers and 64 by the Government. Of a total of 302 cases decided or otherwise disposed of during the fiscal year, 38 were dismissed, 153 were decided wholly in favor of the Government, 93 in favor of the taxpayers and 18 partly in favor of the Government and partly in favor of the taxpayers. There

were 27 petitions filed in the Supreme Court, 11 by the Government and 16 by taxpayers. The granting of writs of review was unopposed by the Government in 11 of the 16 cases filed by the taxpayers. Of the 62 petitions denied, 54 were filed by taxpayers, and eight by the Government.

The records show that during the past year there were 20 seizures of foreign vessels engaged in alleged liquor smuggling. About three-fourths of the seizures made were off the northeastern coast of the United States.

Claims Against the Government

The records of the Division of the Department of Justice having charge of defense of claims against the government in the United States Court of Claims show that in the year which ended June 30, 1931, there were 1,863 cases pending involving total claims of $1,930,581,635. On July 1, 1930, there were 1,928 cases pending with claims aggregating $2,900,067,703. During the year 470 new cases were entered with total claims of $69,486,965. The total amounts in these pending suits filed against the government do not include Indian and patent cases where no definite amounts claimed have been stated.

During the year the total amount of judgments rendered against the government was $5,828,466, in cases in which claimants sought to recover a total of $1,062,438,996. At the present time the cases filed on behalf of Indian Tribes are more important when measured by the amount at issue than all classes of litigation pending before the Court of Claims. During the year five Indian cases, involving approximately $225,000,000 have been filed and two cases involving approximately $1,288,700 were dismissed upon the defendant's motion.

There were pending in the various district courts throughout the country at the beginning of the year 98 cases involving claims against the government aggregating $773,309. There were disposed of during the year 19 cases involving a total of $142,480, and there are still pending 188 cases, with claims amounting to $1,230,624.

Mexican Claims Commission

The Mexican-United States Claims Commission dissolved October 31, 1931, releasing about sixty employees of the Commission.

Disbandment of the Commission had been expected since last August when the Conventions between the United States and the United Mexican States, under which the Commission was created, expired.

The Comptroller General of the United States ruled that the Commission had no funds with which to continue to pay its employees. Negotiations are under way between the State Department and Mexico City looking to renewal of the Conventions and re-establishment of the Commission.

The Anniversary of Our Constitution

A release of the United States George Washington Bicentennial Commission calls attention to the fact that September 17th was the anniversary of the date on which George Washington transmitted the new Constitution of the United States to the President of the Continental Congress.

In his letter transmitting the Constitution, George Washington, as President of the Convention, expressed the wish that the Constitution might "promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness."

The Commission urged every American to consult House Document 398, 69th Congress, entitled "Documents Illustrative of the Formation of the Union of the American States," wherein is found the exact wording of every step in the building of our Government, from the Declaration and Resolves of the First Continental Congress, through the adoption of the Constitution and its later Amendments. The volume may be purchased from the Superintendent of Documents, Washington, D. C., at $2.85 per copy.

Addresses by Chief Justice Hughes

On September 26, 1931, Chief Justice Hughes, of the Supreme Court of the United States, delivered an address on the unveiling of the bust of Chief Justice Taney, at Frederick, Maryland. The Chief Justice also delivered an address on the unveiling of the bust of James Madison in the State Capitol, at Richmond, Virginia, on Tuesday, September 29, 1931, and on the evening of the same day delivered an address before the Virginia State Bar Association and the Richmond City Bar Association at Richmond.

Address by the Attorney General

Hon. William D. Mitchell, Attorney General of the United States, in an address at New Haven, Connecticut, October 3rd, during the dedication of the new buildings of the Yale Law School, stated that "legal education, to produce real results in reforming the administration of justice, must be so directed that our law schools send forth men trained for the active practice of their profession, but with inquisitive minds, not disposed blindly to accept things as they are, and with a vision and idealism to mix with their practical experience, which will make them effective instruments for improvement."

"No doubt we have too many lawyers," he said. "Our 1920 census showed that we had one lawyer for each 862 of population. . . . The result is that there is too much competition for business, especially when times are bad. This causes a lowering of professional standards under economic pressure, a search for business, ambulance chasing, and a temptation at any cost to obtain results satisfactory to clients. We might gain if we could do with our over-production of lawyers what the Brazilians have recently done with their over-production in coffee, dump the poorer grades over-board."

The Attorney General added that "reform in legal systems is in the air and in that field our law schools, by their choice of methods of legal education, can exercise a dominant influence."

Turning to the matter of law enforcement, he said: "We have had blasts against unlawful arrests, criticisms of treatment of arrested persons by the police, voluminous discussion of cases, relatively rare, of conviction of innocent persons, and condemnation of harsh treatment of convicts in our prisons. . . Such lawless methods as are sometimes used are born of difficulty in apprehending and convicting criminals. Instead of pampering the evil-doer, why not strengthen the arm of the prosecutor, give him simpler, more efficient and speedy judicial machinery, so that the incentive for him to overstep the proper limits will disappear?"

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NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Michigan

H. CLAIR JACKSON
President, Michigan Bar Association

Michigan Bar Association Will Ask Legislative Incorporation on California Lines

The Forty-first Annual Meeting of the Michigan State Bar Association which was held in Flint, Michigan, on October 1st and 2d was probably the most significant meeting in the history of the Association. The principal significance of the meeting lay in the fact that the Association after a thorough consideration of the subject, concluded to ask the Legislature of Michigan to pass an act authorizing incorporation of the bar along the lines of the California provisions.

A committee of the Association has been studying the matter of incorporation of the bar during the last year. It filed a comprehensive report on the history of incorporation and the advantages and disadvantages of it. This committee was headed by Mr. Carl V. Essery of Detroit who acted as chairman. Its report was published in XI, Michigan State Bar Journal, pages 50-86. The committee will continue to function during the coming year for the purpose of drafting a bill to be introduced into the State Legislature in 1933.

Another feature of the meeting was a symposium on the subject of Criminal Law and Psychiatric Jurisprudence. One session of the Association meeting was devoted to this symposium. Those taking part in it were Judge Robert M. Toms of the Circuit Court of Wayne County, Michigan; Mr. Louis Cohane of the Detroit Bar, Dr. Theophile Raphael of the University of Michigan Medical School, and Hon. Paul W. Voorhies, attorney general of Michigan.

The meeting closed with the annual banquet at which the after-dinner speeches were limited to the subject "An Appraisal of the Legal Profession." Hon. George S. Clark, associate justice of the Supreme Court of Michigan, gave an appraisal of the profession as seen from the bench; Hon. Wilber M. Brucker, Governor of Michigan, spoke on the public duties of the lawyer; Stuart W. Perry, editor of the Adrian Daily Telegram, read a paper on the subject of the "Courts, the Press and the Public," and Fred G. Dewey of the Detroit Bar spoke on the lawyer as he sees himself.

The officers elected for the coming year are: H. Clair Jackson of Kalamazoo, president; Justin R. Whiting of Jackson, vice-president; Clare J. Hall of Grand Rapids, treasurer, and E. Blythe Stason of Ann Arbor, secretary.

E. BLYTHE STASON, Secretary.

Missouri

Fifty-First Annual Meeting of Missouri Bar Association Favors Adherence to Permanent Court

More than 500 members of the Association attended the recent meeting in St. Louis, according to the Missouri Bar Journal for November. As officers for the ensuing year, the Association elected for president, Boyle G. Clark, of Columbia; for secretary, James A. Potter of Jefferson City; for treasurer, James E. King of St. Louis; for first, second and third vice-presidents, respectively, Ingram D. Hook of Kansas City, R. F. Baynes of New Madrid and S. S. Nowlin of Montgomery City. For delegates to the American Bar Association, Joseph W. Jamison, Fred L. English and President Clark were elected.

"After a message of welcome from Mayor Victor J. Miller, Mr. Frank C. Mann of Springfield made an eloquent response on behalf of the Association.

"President Jamison in his annual address, pointed out the need for integration of the bar in this state, and at the conclusion of his address, the new constitution providing for the affiliation of the bar of the state was presented by Mr. George H. Moore of St. Louis. The new constitution was unanimously adopted. If and when the requisite number of local associations elect to accept its plan for affiliation, it will become operative.

"The Association adopted the report of the Committee on Legal Education and Admission to the Bar, made by Robert B. Caldwell of Kansas City, recommending that the educational standards advocated by the American Bar Association be made the requirements for Missouri.

"The report on Legal Publications, including the Bar Journal, was made by Frank P. Barker, in absence of Mr. Bennett C. Clark, chairman of the committee.

"A conference of local bar presidents and chairmen of grievance committees was held on the day preceding the annual meeting. At this conference, addresses were delivered as follows:

"'Disbarment Proceeding in Missouri,'

BOYLE G. CLARK
President, Missouri Bar Association

by Martin E. Lawson of Liberty; 'Limitation upon the Inherent Power of the Court to Disbar for Misconduct as Citizens and as Lawyers,' by John S. Leahy of St. Louis; 'A Review of Missouri Statutes Applicable to Disbarment Proceedings,' by Allen McReynolds of the Jasper County Bar; 'Financing the Work of Grievance Committees,' by Allen L. Oliver, of Cape Girardeau.

"These addresses were the result of exhaustive study of the respective subjects, and by order of the president, they were printed and copies furnished to all present. As a result of the work of the Conference, the Association authorized the Executive Committee to appropriate $2,500.00 annually for use by the state grievance committee in prosecuting complaints, and further authorized the Association to bear one-half of the expense incurred by local grievance committees, exclusive of St. Louis and Kansas City, in the prosecution of disbarment cases.

"The Conference found that the courts of this state had inherent power to control the conduct of practicing attorneys, but no official code of ethics had been established. A resolution introduced by Martin E. Lawson was adopted requesting the Supreme Court to promulgate a code of legal ethics, thereby officially setting a standard of ethics for the guidance of the Bar.

"The report of the Committee on Uniform State Laws submitted by W. H. H. Piatt of Kansas City, recommending the enactment of the Uniform Sales Act and the Uniform Conditional Sales Act,

and recommending an appropriation in support of the National Conference of Commissioners on Uniform State Laws, was adopted.

"Forrest C. Donnell presented the report of the Committee on Judicial Candidates, recommending that in referendums every member of the Association, regardless of political affiliation, be permitted to vote for a candidate for nomination on the ticket of each political party. The recommendation was adopted and the by-laws of the Association amended accordingly. Heretofore, the referendums of the Bar Association permitted Republican lawyers to vote only for Republican candidates for nomination and Democratic lawyers to vote only for Democratic candidates for nomination.

"A resolution presented by David M. Proctor of Kansas City, advocating the repeal of the primary system for nomination of Appellate Judges and return to the convention system was unanimously adopted.

"The extent to which law was being illegally practiced by lay and corporate agencies in the state, as well as the present status of the quo warranto suits pending in the Supreme Court against certain trust companies, was reported by J. M. Lashly of St. Louis, Chairman of the Committee on Unauthorized Practice of Law by Laymen. At the conclusion of this report, the Association adopted a resolution authorizing the incoming administration to enter the appearance of the Association as a party to the pending Quo Warranto cases, and to support their prosecution financially as well as with aid of counsel.

"Fred L. Williams reported the progress being made by the Law Schools of the University of Missouri, St. Louis University and Washington University in preparing the Missouri Annotations to the Final Restatement of the American Law Institute. The excellent work of the men preparing these Annotations received the unqualified appreciation of the Association. Upon the recommendation of the Committee, funds were again appropriated for the use of these institutions in compiling the Annotations.

"Dr. L. C. Marshall, of Baltimore, Maryland, Institute of Law, Johns Hopkins University, addressed the Association on 'State-Wide Studies for the Improvement of the Administration of Justice.'

"Charles W. German, Chairman of the Committee for Incorporation of the Bar, reported that an Act to incorporate the Bar of Missouri was introduced in the Senate by Hon. Manvel Davis, and was up for first reading on February 3, 1931; that on account of the novelty of the measure and the press of other legislation, the bill was not reported out of Committee. Hope was expressed that in 1933 the measure would receive favorable action.

"A resolution introduced by Willam T. Jones of St. Louis, providing for the appointment of a special committee of five to study the cause for the delay in the administration of civil justice in Missouri, and possible remedies therefor, was adopted by unanimous vote. The special committee will be appointed by the incoming administration, and will report at the next annual meeting.

"The attendance at the annual banquet overflowed the ballroom of the Statler Hotel. Hon. John H. Clarke, former Justice of the Supreme Court of the United States, delivered a most persuasive and masterful address on 'The Duty of the Bench and Bar of America with Respect to the World Court of Justice.'

"On the following day the Association unanimously adopted a resolution offered by Forrest C. Donnell of St. Louis, favoring adherence to the Permanent Court of International Justice upon the terms and conditions of the Protocol of Accession transmitted on December 10, 1930, by the President to the Senate.

"Hon. John J. Esch of Washington, in an address entitled, 'The Breadth of the Commerce Clause,' traced the history and outlined the present breadth of the Commerce Clause of the Federal Constitution. The speaker's personal participation in the subject matter of his address lent interest and gave authority to what he had to say."

On Saturday night there was an extraordinarily successful dinner, given by the Bar Association of St. Louis. John S. Leahy was toastmaster.

New Mexico

New Mexico State Bar Association Holds Annual Meeting

The New Mexico State Bar Association was called to order on Monday, August 17th at 10 o'clock A. M. by President T. E. Mears and, a quorum being present, proceeded to business. There were present about two hundred members of the State Bar. Invocation by Rev. Mr. Edwards of the Methodist Church, Albuquerque, which was followed by the welcome addresses by Mayor Tingle of Albuquerque and by Mr. Louge, President of the Lawyers Club, to which response was made by Judge C. A. Hatch of Clovis, New Mexico. Then followed the Annual address of the President and the Report of the Standing Committees as well as that of the Secretary-Treasurer.

Hon. Ballard Coldwell, of El Paso, Texas, addressed the Association on the "Tendency of Economic Legislation," Hon. A. L. Morgan, of Amarillo, Texas, spoke on "Government and Business," and Hon. Henry W. Toll, of Denver, Colorado, gave a fine address on "Fifty Million Lawmakers." Mrs. Grace McDonald Phillips, of Roswell, New Mexico, gave an address on "Oil and Gas in the Public Domain." Hon. Dennis Chavez reported as to the American Bar Association in 1930.

An informal address was made by Hon. H. L. Bickley, Chief Justice of the Supreme Court, reporting on the meeting of the Judicial session of the Bar Association. He was followed by U. S. Senator Bratton, Hon. L. O. Fullen. Justice Watson, Justice Parker and Justice Sadler, of the New Mexico Supreme Court, and Hon. E. C. Wade.

Justice Hanna, former Supreme Court Justice, presented a set of Resolutions in favor of adhering to the World Court. It was referred to the Resolutions Committee and reported unfavorably. The Association adopted the committee report unanimously.

A resolution authorizing the Board of Bar Examiners to recommend temporary licenses to candidates who had failed in the examination, under certain conditions, was adopted.

A resolution of appreciation of the courtesy of the Lawyers Club and the citizens of the City of Albuquerque was adopted.

MERRITT C. MECHEM
President, New Mexico Bar Association

The ladies, wives and sisters of the members present, were entertained at tea at the Alvarado Hotel on the 17th and at a bridge tea at the home of Mrs. Judge Helmick on the 18th.

A very elaborate banquet was served to the members of the Bar and their wives at the Franciscan Hotel, followed by a very enjoyable dance at the Country Club.

Miss Grace C. Massie, a clerk of the District Court of the Fifth District, who attended the convention at the invitation of the President and committee on arrangements, very gracefully thanked the Association for its courtesy.

Announcement was made of the election of E. L. Holt for the 3rd District for three years; Mr. Jas. A. Hall of Clovis for the Ninth District; Mr. A. H. Darden, also for a term of three years, for the eighth district; and A. N. White for the sixth District to fill a vacancy for two years. The Board met and reorganized and selected Hon. M. C. Mechem of Albuquerque as President; Hon. J. O. Seth, First Vice-President; Hon. H. M. Dow, Second Vice-President; and Jose D. Sena as Secretary-Treasurer.

JOSE D. SENA, Secretary.

Virginia

Virginia State Bar Association Urges Favorable Action on World Court

The Forty-Second Annual Meeting of the Virginia State Bar Association was held at the Greenbrier Hotel, White Sulphur Springs, West Virginia, July 30 to August 1, 1931, according to the Virginia Law Digest of August. The fol-

lowing details of the meeting are taken from the same source.

The program was unique in that three governors appeared on the program, viz: Governor Albert C. Ritchie, of Maryland, who delivered the annual address; Governor William G. Conley, of West Virginia, who introduced the Governor of Maryland, and Governor John Garland Pollard, of Virginia, who introduced Governor Conley.

The first annual meeting was held at White Sulphur Springs in 1889, and another unique feature of the meeting just past was the exhibition of a group picture taken at the meeting in 1899 and owned by Mr. W. A. Patterson, of Richmond.

At the beginning of the Convention, on Thursday, July 30th, the President of the West Virginia Bar Association, Honorable S. P. Bell, of Spencer, W. Va., delivered an address of welcome to which Mr. Virginius R. Shackelford, Chairman of the Executive Committee, responded.

The President of the Association, Mr. Robert L. Pennington, then delivered the President's address, the subject of which was, "Law and Lawyers in the Making of a Nation."

The rest of the morning session was devoted to reports of the regular committees and, after the announcement of the personnel of the Committees to act at the meeting—on Publications, on Obituaries, and on Resolutions, respectively—a resolution approving ratification of the World Court Protocols by the United States Senate was offered by Mr. Eppa Hunton, Jr., of Richmond, and referred to the Committee on Resolutions.

The resolution offered by Mr. Hunton was, on the last day of the meeting, unanimously approved by the Committee on Resolutions and passed by a unanimous vote of the meeting.

In the afternoon the recently elected President of Washington and Lee University, Dr. Francis P. Gaines, delivered an address before the Judicial Section, the subject of which was "Education for Civic Responsibility."

The largest attendance of any session was upon the occasion of Governor Ritchie's address at 8:30 P. M., on the 30th. The subject of Governor Ritchie's address was "Unemployment—If Business Will Do Nothing About It, Government Will." Governor Ritchie's address was accorded a most favorable reception and his presence throughout the meeting added greatly to the pleasure of those who had the good fortune to meet him.

On Friday, the 31st, at the morning session, a very interesting paper was read by Judge John W. Price, of Virginia and Washington, D. C. Subject: "Mr. Jefferson's Statute of Religious Freedom," and at 8:30 that evening Honorable William H. Rouse, of Bristol, delivered an address entitled "The Romance of a Boundary Line," which consisted of a history of the line between Virginia and North Carolina and Tennessee.

On Saturday, August 1st, Honorable George C. Peery, of Tazewell, member of the State Corporation Commission, read a paper, the subject of which was "Some Observations on Governmental Regulation."

The last event was the usual annual dinner, the feature of which was an address by Honorable John J. Parker, United States Circuit Judge, of Charlotte, N. C.

VIRGINIUS R. SHACKELFORD
President, Virginia Bar Association

The election on the last day of the meeting resulted as follows: President, Virginius R. Shackelford, Orange; vice-presidents: Southwest, John B. Spiers, Radford; Southside, Bernard C. Syme, Petersburg; Tidewater, John N. Sebrell, Norfolk; Piedmont, Robert Whitehead, Lovingston; Valley, Aubrey W. Weaver, Front Royal.

Mr. F. C. McCandlish, of Fairfax, was elected a member of the Executive Committee for the unexpired term of Mr. Shackelford, and Mr. W. A. Stuart, of Abingdon, and Mr. Kennon C. Whittle, of Martinsville, were elected for terms ending at the 1934 annual meeting. Members of the Executive Committee who held over are Mr. Claude M. Bain, of Norfolk; Mr. Paul C. Buford, Jr., of Roanoke; Mr. F. D. G. Ribble, of the University. Mr. Ribble was elected Chairman of the Executive Committee at the organization meeting after the adjournment of the annual meeting of the Association.

The Judicial Section elected as its officers for the ensuing year Judge Don P. Halsey, of Lynchburg, Chairman; Judge Philip Williams, of Winchester, Vice-Chairman; Judge Frank T. Sutton, Jr., of Richmond, Secretary.

The Baton Rouge (La.) Bar Association, at a meeting on August 5th, elected C. V. Porter as President; J. Y. Sanders, Jr., Vice-President, and John R. Fridge, Secretary. L. A. Himes was re-elected Treasurer.

A Second District (Ind.) Bar Association was formed at a meeting of attorneys in Hazelden, recently held. C. M. Snyder and Homer Hawkins, both of Fowler, are President and Secretary, respectively.

OFFICIAL DIRECTORY, 1931-1932

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705 Olive Street

Secretary

William P. MacCracken, Jr.....Chicago, Ill.
1140 North Dearborn St.

Assistant Secretary

Richard Bentley .....Chicago, Ill.
1140 North Dearborn St.

Executive Secretary

Olive G. Ricker.....Chicago, Ill.
1140 North Dearborn St.

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John H. Voorhees.....Sioux Falls, S. D.
Treasurer's Office, 1140 North Dearborn St., Chicago, Ill.

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Minnesota—Minneapolis.....F. H. Stinchfield
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Montana—Butte.....Dan M. Kelly
Nebraska—Omaha.....Edward R. Burke
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New Hampshire—Manchester.....Louis S. Wyman
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New Mexico—Albuquerque.....George S. Klock
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Tennessee—Memphis.....Walter Chandler
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Section on Legal Education and Admissions to the Bar

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Vice-Chairman, Oscar Hallam.....St. Paul, Minn.
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Adviser, Will Shafroth.....Denver, Colo.
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Conference of Bar Association Delegates

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Vice-Chairman, David A. Simmons.....Houston, Tex.
Secretary, Herbert Harley.....Washington, D. C.
Council: Elihu Root, New York City; Harry S. Knight, Sunbury, Pa.; Edward H. Cabiniss, Birmingham, Ala.; Alfred J. Schweppe, Seattle, Wash.; Charles E. Clark, New Haven, Conn.; Frank W. Grinnell, Boston, Mass.; Royal A. Stone, St. Paul, Minn.; Oscar C. Hull, Detroit, Mich.; Charles A. Beardsley, Oakland, Calif.; Robert H. Jackson, Jamestown, N. Y.

Section of Mineral Law

Chairman, J. C. Denton.....Tulsa, Okla.
Vice-Chairman, D. J. F. Strother.....Welch, W. Va.
Secretary, Peter Q. Nyce.....Washington, D. C.
Council: James A. Veasey, Tulsa, Okla.; James W. Finley, Bartlesville, Okla.; John C. Townes, Houston, Tex.; P. C. Spencer, Independence, Kan.; D. M. Kelley, Butte, Mont.; E. L. Greever, Tazewell, Va.; Charles S. Thomas, Denver, Colo.

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Vice-Chairman, John M. Grimm.....Cedar Rapids, Iowa
Executive Committee: Edward R. Finch, New York; George M. Powers, Morrisville, Vt.; Charles A. Goss, Lincoln, Neb.; Jesse C. Adkins, Washington, D. C., and officers ex-officio.

Section of Patent, Copyright and Trademark Law

Chairman, Charles H. Howson.....Philadelphia, Pa.
Vice-Chairman, Jo Baily Brown.....Pittsburgh, Pa.
Secretary, Henry E. Stauffer.....Washington, D. C.
Treasurer, Nelson W. Howard.....Boston, Mass.
Council: The Officers ex-officio and Edward S. Rogers, Chicago; Henry M. Huxley, Chicago; Marcus B. May, Boston, and Henry D. Williams, New York.

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